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85-2169

Supreme Court, U.S.
FILED
JUL 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities,

Petitioners

v.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

July, 1986

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QUESTIONS PRESENTED

1. Does a claim by an "Arab" who is admittedly Caucasian, i.e., racially white, when he is presumably claiming other Caucasians or whites were improperly favored over him, consitute an allowable racial or any other allowable claim under 42 U.S.C. § 1981?

2. In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), the United States Court of Appeals for the Third Circuit concluded that the ruling of this Court in Wilson v. Garcia, ____ U.S.____, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under 42 U.S.C. § 1981.

The question presented is:

Did the court of appeals err in applying Chevron Oil Co. v. Huson and Wilson v. Garcia when it refused to apply

the two-year statute retroactively and instead held that its decision in Goodman would not be applied retroactively to § 1981 causes of action accruing, it would appear, after 1977 and for some period after.

3. Are individual members of a college tenure committee subject to liability under 42 U.S.C. § 1981, when the function of the committee is only to make recommendations and the committee and its members do not have decision-making capacity and authority, such capacity and authority being in the Board of Trustees?

4. Was the decision of the court of appeals that the district court should reconsider the discovery rulings appealed in light of its (the Circuit's) recent decision in Equal Employment Opportunity Commission v. Franklin and Marshall College in error in that it does not

protect the secrecy and confidentiality of the Tenure Committee proceedings?

[Note: Petitioners reserve the right to argue Question 5 in the event certiorari is granted on the above questions, but do not include Question 5 among the reasons for the grant of certiorari].

5. Is a prima facie 42 U.S.C. § 1981 case present, in a college denial of tenure context, when, inter alia, no one in the plaintiff's department was recommended for or granted tenure until two years after the tenure decision as to plaintiff and that person was plaintiff's wife?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the respondent, Majid Ghaidan Al-Khazraji a/k/a Majid Al-Khazraji Allan, and the petitioners, Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, individually and in their official capacities.

Petitioner, Saint Francis College, has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioners, Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, individually and in their official capacities, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 3. 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 784 F.2d 505 and is present in the appendix hereto, p. 1a, infra.

The Memorandum Opinion of the United States Court for the Western District of

Pennsylvania (Mencer, D.J.) has not been reported. It is present in the appendix hereto, p. 34a, infra.

The Opinion of the United States Court for the Western District of Pennsylvania (Ziegler, D.J.) is reported at 523 F.Supp. 386. It is present in the appendix hereto, p. 46a, infra.

JURISDICTION

The United States Court for the Western District of Pennsylvania had jurisdiction of the claim under 42 U.S.C. § 1981, except to the extent that issues herein may operate to remove jurisdiction. On March 12, 1985, the District Court granted petitioners' motion for summary judgment in favor of each of the petitioners. See p. 34a, infra.

On respondent's appeal, the United States Court of Appeals for the Third Circuit on March 3, 1986, entered a

judgment and an opinion reversing the judgment below and remanding for further proceedings consistent with the Opinion of the Court. See p. 1a, infra.

The Court of Appeals denied a timely petition for rehearing on April 4, 1986. See p. 80a, infra.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

The named petitioners in this petition are Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, individually and in their official capacities. The nine named natural persons were members of the Saint Francis College Committee on Tenure at the time of the Committee's negative vote on the tenure application of respondent, a former faculty member at petitioner college, in February of 1978. Respondent's 42 U.S.C. § 1981 claim of discrimination in denying him tenure is the subject of this petition.

Three complaints were filed on behalf of respondent, Majid G. Al-Khazraji, in the United States Court for the Western District of Pennsylvania.

The first was filed pro se on October

30, 1980, against petitioner, Saint Francis College, only. The alleged basis for relief in that complaint is a violation of Title VII of the Civil Rights Act of 1964, as amended.[1] (7a)

The second complaint, labeled "Amended Complaint," was filed by prior counsel for respondent on November 7, 1980, against petitioner, Saint Francis College, and nine members of its faculty and administration (the nine named petitioners) individually and in their official capacities. This Amended Complaint [hereinafter sometimes Amended Complaint or Amended Complaint I] is in three counts. Count I charges a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.

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[1]References to the record, e.g., (7a), are to pages in the Appendix filed in the United States Court of Appeals for the Third Circuit. References to (Appendix __a) are to the Appendix to this Petition.

§ 2000e et seq. Count II charges a violation of 42 U.S.C. §§ 1985(3) and 1986. While Paragraph 2 of Amended Complaint I states that this action arises under 42 U.S.C. §§ 1981, 1983, 1985(3), and 2000e, Count II in the Claims for Relief portion of Amended Complaint I restricts itself to 42 U.S.C. §§ 1985(3) and 1986. Count III raises certain state claims, which are alleged to be pendent to the federal claims. (11a)

The third complaint, labeled "Amendment to Civil Action Complaint No. 80-1550 filed at the United States District Court for the Western District of Pennsylvania," was filed pro se on November 10, 1980, against defendant, Saint Francis College, and eight of the nine persons named in the second complaint. In this third complaint [hereinafter sometimes referred to as

Amended Complaint II], the alleged basis for relief is a violation of Title VII of the Civil Rights Act of 1964, as amended.

Pre-trial motions in essence to dismiss were filed. Portions were granted and portions were denied by District Judge Ziegler. Dismissal of the 42 U.S.C. § 1981 claim was denied. Al-Khazraji v. Saint Francis College, 523 F.Supp. 386 (W.D.Pa. 1981). District Judge Ziegler, in a pre-Wilson v. Garcia, _____ U.S. _____, 105 S.Ct. 1938 (1985), situation, following Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978), applied a six-year statute of limitations. As to the underlying elements of a § 1981 claim, Judge Ziegler, in essence, read the three complaints filed by respondent together. Even though Amended Complaint I, the only complaint which mentioned a § 1981 claim and the one which he treated as the

operative amendment, did not mention race, (Appendix 70a- 71a and 73a) Judge Ziegler concluded, inter alia, that respondent was making a claim that he was denied tenure because he is an "Arabian born in Iraq," (Appendix 71a) and that such a claim may serve as the basis for a civil rights action under 42 U.S.C. § 1981.

The attorney-prepared complaint (Amended Complaint I), the one treated by Judge Ziegler as the operative amendment, charged discrimination on the basis of national origin and religion. As previously stated, it did not mention race. None of the three complaints contained an allegation of discrimination because of color. In the three federal court complaints (7a, 11a, 26a) plaintiff twice claimed "Muslim, Arabian, and Iraqi in national origin," once claimed "national origin and religion," and also

claimed "national origin (Iraq), religion (Muslim), and/or race (Arabian)."

Thereafter, District Judge Mencer, to whom the case had been re-assigned, denied certain requests by respondent for discovery of, inter alia, the vote of individual members of the Tenure Committee and the reasons for each member's vote.

Petitioners thereafter moved for summary judgment. This motion was granted and judgment was entered in favor of each of the respondents. As to the § 1981 aspect, District Judge Mencer stated, in part (Appendix 37a-39a):

> Additionally, plaintiff does not qualify as a member of a protected minority under § 1981. Section 1981 is generally considered to apply only to racial and alienage discrimination, 3 A. Larson, Employment Discrimination, § 71.00 et seq.; 4 A. Larson, Employment Discrimination, § 94.00 et seq. The Amended Complaint alleges discrimination

on the basis of national origin and religion, and not on the basis of race or alienage. Accordingly, the alleged acts of discrimintion here are not within the scope of 42 U.S.C. § 1981.

Even if the Amended Complaint were to be read as making a racial claim under § 1981, plaintiff factually does not qualify as a protected minority member. At his deposition plaintiff stated:

> Q. Are you also taking the position that you were denied tenure because of your race?
>
> A. Yes.
>
> Q. What is your race?
>
> A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion.

Plaintiff is claiming that he was discriminated against because of his national origin, Iraq, his ancestry, Arabian, and his religious creed, Muslim. A claim of discrimination on the basis of being an Iraqi or Arab is not cognizable under § 1981. Ibrahim v. New York State

Department of Health, 581 F. Supp. 228 (E.D.N.Y. 1984).

> Accordingly, we must conclude that plaintiff is unable to establish a prima facie § 1981 case.

As to the liability of the nine members of the Tenure Committee, Judge Mencer stated, inter alia (Appendix 41a-43a):

> . . . It should be noted that the function of the Tenure Committee, and its members in voting, under the Guidelines for Tenure, is to make recommendations, and the Committee and its members do not have decision-making capacity and authority. The Tenure Committee, and its members in voting, under the Guidelines for Tenure, are to render a qualitative judgment, which judgment here, as manifested in the vote of the Committee, was negative. The authority and power of the Board of Trustees, under the governing College documents, including the Guidelines for Tenure, was exercised to deny and withhold tenure. Thus, the individual defendants lack capacity to be sued and authority to be sued in either an individual or a representative or an official capacity, inasmuch, as previously stated, their

> function in the tenure process is merely to make a recommendation and they do not have decision-making capacity and/or authority. Furthermore, the Tenure Committee is not a legal entity or an entity subject to suit, and lacks capacity to be sued and authority to be sued, since the function of the Tenure Committee in the tenure process, under the Guidelines for Tenure, is merely to make a recommendation and it does not have decision-making capacity and/or authority. In view of the limited, non-decision-making role of the individual defendants in the tenure process, they are thus not subject to liability under any of the theories propounded by plaintiff.

On appeal, the judgment of the district court was reversed and the case was remanded for proceedings consistent with the opinion, Al-Khazraji v Saint Francis College, 784 F.2d 505 (3d Cir. 1986).

The United States Court of Appeals for the Third Circuit held that "ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against

them." The Court concluded that "Congress's purpose [in enacting § 1981] was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive." [Footnote number omitted.] (Appendix 24 a) The Court added that, "Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens." (Appendix 25a) It concluded its discussion of this aspect of § 1981 liability by stating [Footnote is omitted.]:

> . . . However, where a plaintiff comes into federal court and claims that he has been discriminated against because of

> his race, we will not force him first to prove his pedigree. We are unwilling to assert that Arabs cannot be the victims of racial prejudice: "prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is a usage or image based on all the mistaken concepts of 'race.'" Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979).[17]
>
> Accordingly, Al-Khazraji should be allowed the opportunity to prove that the discrimination he alleges is racially motivated within the meaning of Section 1981. (Appendix 26a-27a)

As to the contention of respondents that the statute of limitations had run as to the § 1981 claim, the Third Circuit noted that it had concluded in Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), that the ruling of the Supreme Court in Wilson v. Garcia, _____ U.S. _____, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of

limitations for personal injuries be applied to actions brought under § 1981. However, in applying Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), the Third Circuit refused to apply the two-year statute of limitations and instead held that its decision in Goodman would not be applied to § 1981 causes of action accruing, it would appear, after 1977 and for some period after.

As to liability of the individual petitioners under § 1981, viewing § 1981 as in the nature of a tort remedy, the Third Circuit concluded (Appendix 27a-28a):

> If individuals are personally involved in the discrimination against the Appellant, and if they intentionally caused the College to infringe on Appellant's Section 1981 rights, or if they authorized, directed, or participated in the alleged discriminatory conduct, they may be held liable. See Manuel v. International Harvester Company, 502 F.Supp. 45 (N.D. Ill. 1980); Coley v. M & M Mars, Inc., 461

F.Supp. 1073 (M.D. Ga. 1978): see also Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236-37 (Section 1982 suit permitted against corporation and its directors.)

In his appeal to the Third Circuit, respondent contended that the District Court abused its discretion in denying discovery as to the deliberations of the Tenure Committee and other matters in the tenure process. Primarily at issue was the appropriateness of allowing inquiry into the Tenure Committee proceedings, including within that term comparative data as to the credentials of successful candidates to the extent considered by the Committee, respondent in his Brief filed with the Third Circuit having discussed the credentials in that context.

On the discovery issue, the Third Circuit stated that on remand, the District Court should reconsider the

discovery rulings appealed in light of the recent Third Circuit decision in Equal Employment Opportunity Commission v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985). Certiorari has since been denied in the Franklin and Marshall case. _____ U.S.L.W. _____ (June 2, 1986).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Third Circuit applying 42 U.S.C. § 1981 to an "Arab" who is Caucasian (a) erroneously extends the scope of § 1981, (b) conflicts with a decision in the Fourth Circuit, and (c) raises an important question of federal law.

As to the race and 42 U.S.C. § 1981 claims, it is respectfully submitted that the Third Circuit erred in concluding that plaintiff-respondent [hereinafter sometimes plaintiff] may sue under 42 U.S.C. § 1981, even though, based on his own deposition testimony, plaintiff is Caucasian, (Appendix 38a) i.e., racially white, and, therefore, not a protected person under § 1981 when he is presumably claiming other Caucasians or whites were

improperly favored over him.[2] This is the first case, to the knowledge of counsel for petitioners, that has held that a claim of discrimination on the basis of being an Iraqi or Arab is cognizable under § 1981 and one case, Ibrahim v. New York State Department of Health, 581 F.Supp. 228 (E.D.N.Y. 1984), has held squarely to the contrary.[3]

The Third Circuit's decision here directly conflicts with the decision of

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[2]It may be of significance that the EEOC, Government-Wide Standard Race/Ethnic Categories, 42 Fed. Reg. 17,900 (1977), read, inter alia: "1. White, not of Hispanic Origin.--Persons having origins in any of the original peoples of Europe, North Africa, or the Middle East."

[3]In one previous case, Abdulrahim v. Gene B. Glick Co., Inc., Civil No. F 84-337 (N.D.Ind. June 26, 1985) (available on LEXIS, Genfed library, Dist file), the District Court held that an allegation that a Palestinian/Syrian was "non-white" was sufficient to make out a § 1981 claim. As noted previously, there is no such allegation of color in the complaints here.

the Fourth Circuit in Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), interpreting the race discrimination provisions of 42 U.S.C. §§1981 and 1982. In Shaare Tefila Congregation, the Fourth Circuit held that "discrimination against Jews is not racial discrimination." 785 F.2d at 527. While Shaare Tefila Congregation did not involve Arabs, any difference between "Arabs" and "Jews" would not prevent Al-Khazraji and Shaare Tefila Congregation from being substantially indistinguishable.

As background to the present § 1981 issue, this Court, in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 2189 (1968), stated: ". . . In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968 . . . the statute [§ 1982] deals only with racial discrimination and does

not address itself to discrimination on grounds of religion or national origin." (Emphasis supplied) Although Jones v. Alfred H. Mayer Co., was concerned with 42 U.S.C. § 1982, the limitation of § 1982 to racial discrimination applies equally to 42 U.S.C. § 1981. See Runyon v. McCrary, 427 U.S. 160, 96 S. Ct. 2586 (1976); State of Georgia v. Rachel, 384 U.S. 780, 791, 86 S.Ct. 1783, 1789 (1966).[4]

In Runyon v. McCrary, supra, 427 U.S. at 167-68, this Court stated:

> It is worth noting at the outset some of the questions that these cases do not present . . . . They do not present any questions of the right of a private school to limit its student body to boys,

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[4]42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

> to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds. Rather, these cases present only two basic questions: whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied. [Footnote number omitted.]

In Georgia v. Rachel, supra, 384 U.S. at 791, commenting on the Civil Rights Act of 1866 [now 42 U.S.C. § 1981 in slightly changed form], the Court noted that the phrase "any law providing for . . . equal civil rights" was not intended and should not be construed to apply to discrimination on any basis other than race:

> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase 'as is enjoyed by white citizens.' That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected." [Footnote number omitted.]

It should be noted that in the state discrimination complaints filed by plaintiff prior to filing the federal court case plaintiff never claimed racial bias. In the state court action he claimed "ethnic (Arab) and religious (Muslim) background were involved and included" (Exhibit E-3 to Motion for Summary Judgment -- p. 6 of state Amended Complaint) (190a) and in the Pennsylvania Human Relations Commission complaint, which it is believed was also the EEOC complaint, "have discriminated against me

because of my national origin, Iraq, my ancestry Arabian, and my religious creed Muslim." In the three federal court complaints (7a, 11a, 26a) he twice claimed "Muslim, Arabian, and Iraqi in national origin," once claimed "national origin and religion," and also claimed "national origin (Iraq), religion (Muslim), and/or race (Arabian)." Race here thus is not used by plaintiff in the § 1981 racial sense, but instead in a national origin sense. Furthermore, as previously noted, this term is not used in the Amended Complaint which is the operative one as to § 1981 and the only one which raises a § 1981 claim. At his deposition plaintiff stated, at pp. 6, 7-8 [This matter is discussed at greater length at pp. 6-9 of petitioner's deposition.]:

> Q. Are you also taking the position that you were denied tenure because of your race?

A. Yes.

Q. What is your race?

A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion. [p. 6]

* * *

Q. What other reasons did you say you feel you were discriminated against?

A. National origin and religion or a combination of the two.

Q. What is your national origin?

A. Arabian and Iraqie.

Q. Are both Arabian and Iraqie-

A. and Moslem.

Q. Are both Arabian and Iraqie national origin designations?

A. Iraq is part of Arabia.

Q. You are treating Arabia as a place of national origin?

A. You may say so. This is what we call the Arabian peninsula.

> Q. That is the geographical area?
>
> A. That's right. This separates it from Iraq, Pakistan and so forth. It makes the Arabian peninsula separate. [pp. 7-8]

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), is not inconsistant with the view that § 1981 does not apply to a claim by a Caucasian when he or she is presumably claiming other Caucasians or whites were improperly favored over him. A claim based on status as a Arab or an Iraqi, it is submitted, is a national origin claim, not a racial claim. If such a claim is treated as a racial claim, then it is difficulty to see much, if any, basis for limiting the extent to which national origin claims are also racial ones. The Third Circuit here has defined race, for § 1981 purposes, as "membership in a group that is ethnically and

physiognomically distinctive." (Appendix 24a). The net result appears to be a substantial expansion in the scope of § 1981 beyond the language of the statute and, based on the discussion of the legislative history in the concurring opinion of Judge Adams, "well beyond what Congress intended when it passed the law.[1] " [Footnote is omitted.] (Appendix 32a) Such a drastic expansion of the statute warrants this Court's attention.

Furthermore, as a matter of policy, it is respectfully submitted that expansion of 42 U.S.C. § 1981 is inconsistent with the statutory scheme of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which specifically covers national origin discrimination and under which, as noted by this Court in Great American Federal Savings & Loan Association v.

Novotny, 422 U.S. 366 (1979), cases are "subject to a detailed administrative and judicial process designed to provide an opportunity for non-judicial and nonadversary resolution of claims." While this Court has "held that the passage of Title VII did not work an implied repealer of the substantive rights to contract conferred by the . . .statute codified at . . . § 1981," Novotny at 377, no reason of policy appears to justify expansion of § 1981 in light of the existence of Title VII.

As to the effect of the expansion here of § 1981, Judge Adams, in his concurring opinion, notes in footnote 1 (Appendix 32a)

> In light of the continual flow of immigrants to the United States, the consequences of this expansion are quite substantial. Persons from most of the Middle East and Asia, for example, would

> now appear able to sue under § 1981. As of 1980, there were 2,539,800 persons born in Asia living in the United States, as well as 43,400 from Egypt and 71,500 from North Africa. United States Department of Commerce, Bureau of Census, Statistical Abstract of the United States (1985), at 87. I do not mean to suggest that this inflow is in any way undesirable; the figures, rather, point up the extent of the expansion of the statute, which underpins, I believe, the need for Congress, as opposed to the judiciary, to decide on the appropriateness of this result.

One of the potential difficulties possibly present in the approach of the Third Circuit here is expressed in the following excerpt from the decision in Sere v. Board of Trustees of the University of Illinois, 628 F.Supp. 1543, 1546 (N.D. Ill. 1986) [Footnote and footnnote number are omitted.]:

> Sere argues that he is a Nigerian black, while his supervisor and replacement are American blacks with lighter skin pigmentation. But this is

> insufficient to save Count II. It is settled law in this circuit that discrimination on the basis of national origin is not actionable under § 1981, Anooya v. Hilton Hotels Corp., 733 F.2d 48, 50 (7th Cir. 1984), and although the court recognizes that discrimination based on skin color may occur among members of the same race, plaintiff is unable to offer any authority for the novel proposition that such discrimination may form the basis of a cause of action under § 1981. This court refuses to create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit. Count II must therefore be dismissed.

For the foregoing reasons, plenary consideration by this Court is essential and respectfully requested.

II

The decision of the Third Circuit not to apply its decision in **Goodman v. Lukens Steel** retroactively (a) conflicts with decisions in other circuits, (b) conflicts in principle with this Court's decision in **Chevron Oil Co. v. Huson**, and (c) raises an important question of federal law.

In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), the Third Circuit concluded that the ruling of this Court in Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985) mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under 42 U.S.C.§ 1981. The Court also applied the decision retroactively to a § 1981 action commenced in 1973. However, in the instant case, Al-Khazraji, the Third Circuit, in applying Chevron Oil Co. v. Huson, refused to apply the two year

statute retroactively and instead held that its decision in Goodman would not be applied retroactively to § 1981 causes of action accruing, it would appear, after 1977 and for some period after. As previously stated, the denial of tenure was in February of 1978.

The present status of retroactivity decisions nationally under the various Civil Rights Acts is summarized by Mr. Justice White in his dissent to the denial of certiorari in Mulligan v. Hazard, 777 F.2d 340, cert. denied, 54 U.S.L.W. 3808 (June 10, 1986): [5]

> In Wilson v. Garcia, ___ U.S. ___ (1985), we held that an action brought under 42 U.S.C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state

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[5] The Seventh Circuit has also dealt with the issue in Anton v. Lehpamer, No. 85-2565 (7th Cir. April 3, 1986) (available on Lexis, Genfed library, USAPP file) (nonretroactive application).

statute of limitations. Since our decision in that case, the courts of appeals have differed on whether Wilson should be given retroactive effect. In the present case, the Sixth Circuit held, without qualification, that Wilson should be given retroactive effect. 777 F.2d 340 (1985). The Courts of Appeals for the Fifth and Eleventh Circuits have reached similar results. Gates v. Spinks, 771 F.2d 916 (CA5 1985), cert. denied, ___ U.S. ___ (1986); Jones v. Preuit & Mauldin, 763 F.2d 1250 (CA11 1985), cert denied, ___ U.S. ___ (1986). Two other courts of appeals, however, have determined that when retroactive application would shorten the statute of limitations, Wilson merits only prospective relief. Gibson v. United States, 781 F.2d 1334 (CA9 1986); Jackson v. City of Bloomfield, 731 F.2d 652 (CA10 1984). Although the Third and Eighth Circuits have applied Wilson retroactively in certain cases, it is unclear whether their holdings are designed to have universal application. See Wycoff v. Menke, 773 F.2d 983, 986-987 (CA8 1985); Fitzgerald v. Larson, 769 F.2d 160, 162-164 (CA3 1985); Smith v. City of Pittsburgh, 764 F.2d 188, 194-196 (CA3 1985).

In addition, the courts of appeals also have reached

conflicting results concerning what should be done when more than one state statute of limitations applies to personal injury actions. In Hamilton v. City of Overton Park, 730 F.2d 613 (1984) (en banc), cert. denied ___ U.S. ___ (1985), and Mishmash v. Murray City, 730 F.2d 1366 (1984) (en banc), cert. denied, ___ U.S. ___ (1985), the Tenth Circuit rejected, for § 1983 purposes, the state statute of limitations for intentional torts, and chose instead a state's residual statute of limitations. See generally Preuit & Mauldin v. Jones, ___ U.S. ___, ___ - ___ (1986) (White J. dissenting from the denial of certiorari). The Eleventh Circuit in Jones v. Preuit & Mauldin, supra, the Fifth Circuit in Gates v. Spinks, supra, and the Sixth Circuit in the present case, however, follow a different rule, and select the state statute of limitations governing intentional torts.

The Court's decision not to review the instant case marks the third time this term that it has refused to address these differences that exist between the courts of appeals; differences that are not likely to disappear without guidance from this Court. Given the square conflicts among the circuits, and the frequency with which these cases arise, I would

> grant the petition for certiorari in this case.

While the instant case involves section § 1981, rather than § 1983, the retroactivity issues are similar, if not identical. It should be noted that the three retroactivity cases in which certiorari was denied--Gates, Jones and Mulligan--are cases which are categorized as those in which Wilson v. Garcia was given retroactive effect. The issue is a recurring one. Plenary consideration by the Court thus is essential.

On the underlying retroactivity issue, as the Third Circuit noted, (Appendix 13a-14a), Chevron requires the federal courts to undertake a three-part analysis [citations are omitted.]:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or

> by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retrospective application, for [w]here a decision of this Court could produce substantially inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."
>
> 404 U.S. at 106-07.

Essentially, the Third Circuit's theory was that after 1977 the precedents in the circuit were sufficiently clear that plaintiff could reasonably have relied on them. Petitioners submit, first, that the precedents were not as clear as the opinion of the Third Circuit indicates. The opinion here in

Al-Khazraji relies primarily on Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978), as making it "absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination." (Appendix 16a)

A number of comments should be made in response to this statement in the opinion. First, Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978) [hereinafter sometimes Davis], did not apply a six year statute of limitations generally to section 1981 actions. The opinion specifically states, at 341 n. 8: "We reiterate that, for statute of limitations purposes, each complaint and different aspects of the same complaint may be treated differently. We hold only that 12 P.S. [section] 31 applies to actions where the gist of a [section]

1981 complaint concerns racially discriminatory discharge of an employee under the facts in this record." (Emphasis supplied.) [6] Thus, from Davis itself, it was not "absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination." Furthermore, Davis was a discharge case and not a denial of tenure case. Counsel for petitioner is not aware of any Third Circuit case or case decided by a District Court in the Circuit, decided prior to the filing of the instant case in November of 1980, that held that the six year statute of limitations applied to a § 1981 denial of tenure case. Furthermore, since Davis

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[6] As counsel for petitioners reads Davis, the Third Circuit did not decide whether the tort action not involving personal injury portion or the contract portion of former 12 P.S. 31 made the six year statute applicable there.

was decided under an earlier version of the Pennsylvania statute of limitations scheme, it is submitted that there cannot have been justifiable reliance on Davis in view of a 1978 revision of the Pennsylvania statute of limitations scheme, particularly as the record shows that petitioner had counsel at least as early as May, 1979, well before the two year statute of limitations would have run[7]. (207 a)

It is also submitted that in view of the status nationally of statute of limitation periods under the various Civil Rights Acts, as discussed in Smith v. City of Pittsburgh, 764 F.2d 188, 192-193 (3d Cir. 1985) and Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), aff'd, ___ U.S. ___, 105 S.Ct. 1938 (1985), the

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[7]The new Pennsylvania statutory scheme is discussed in more detail in the opinion of Judge Ziegler, at Appendix 60a-65a.

determination of what is "precedent on which litigants may have relied" (Chevron, 404 U.S. at 106) is not limited to precedent of the Third Circuit, but is to be determined on a national basis. On such a basis there was no precedent on which respondent may have relied. As this Court said in Wilson v. Garcia, 105 S.Ct. at 1942, "Thus, the conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons for granting certiorari." The situation as to § 1981 is described in 3 A. Larson, Employment Discrimination, § 90.20, at pp. 18-23-18-36, in a release as of November of 1984 [Footnotes and footnote numbers are omitted.]: "Decisions vary from state to state, with some states using the statute of limitations for contract actions, tort

actions, actions for the recovery of wages, or actions brought under antidiscrimination or other state or Federal statutes."

For the foregoing reasons, plenary consideration by this Court is essential and is respectfully requested.

III.

The decision of the Third Circuit that the individual defendants may be held personally liable under the facts here (a) erroneously extends the scope of Section 1981, (b) raises an important question of federal law, and (c) appears to be inconsistent in principle with the decision of this Court in Anderson v. Liberty Lobby.

As noted by District Judge Mencer in his opinion granting the motion for summary judgment, (Appendix 41a-43a) the crux of the situation as to the individual petitioners-defendants is as follows:

> . . . the function of the Tenure Committee, and its members in voting, under the Guidelines for Tenure, is to make recommendations, and the Committee and its members do not have decision-making capacity and authority. The Tenure Committee, and its members in voting, under the Guidelines for Tenure, are to render a qualitative judgment, which judgment here, as manifested in the vote of

> the Committee, was negative. The authority and power of the Board of Trustees, under the governing College documents, including the Guidelines for Tenure, was exercised to deny and withhold tenure . . . . [T]heir [the individual defendants] function in the tenure process is merely to make a recommendation and they do not have decision-making capacity and/or authority. . . . In view of the limited, non-decision-making role of the individual defendants in the tenure process, they are thus not subject to liability under any of the theories propounded by plaintiff. (Emphasis added.)

It is respectfully submitted that the analysis of the District Court succinctly and correctly analyzes the issue of the liability of the individual petitioners. The cases cited by the Third Circuit, (Appendix 27a-28a) under the facts here, are not to the contrary.

The reversal of the granting of the summary judgment motion appears to be inconsistent with the recent decision of this Court in Anderson v. Liberty Lobby,

No. 84-1602 (U.S. Supreme Court June 25, 1986) (available on Lexis, Genfed library, US file). Based on the limitedd, non-decision-making role of the individual petitioners in the tenure process, a fact not disputed by plaintiff below, the evidence is "so one-sided that one party [,here the individual petitioners,] must prevail as a matter of law." Anderson v. Liberty Lobby, at _____ _____.

In this regard, as to the summary judgment aspect as to all petitioners, the Third Circuit did not deal with that portion of the district court's rationale for granting summary judgment which is mentioned, in part, in the following excerpt from the Court's Opinion, at p. 7, (Appendix 7a) "Judge Mencer held that Al-Khazraji had not made out a prima facie case under Section 1981 because, since 1978, the only other person to

receive tenure in the Department of Behavioral Science at St. Francis was Al-Khazraji's wife." As to this aspect, Judge Mencer stated (Appendix 36a-37a):

> Proof of intent and purposeful discrimination are necessary elements of a Section 1981 claim. Croker v. Boeing Company, 662 F.2d 975 (3d Cir. 1981).
>
> During the academic year at issue, Academic Year 1977-1978, no other person in the Department of Behavioral Science was recommended for tenure by the Committee on Tenure or granted tenure by the Board of Trustees, no other person in the Department was recommended for, and granted, tenure until Academic Year 1979-1980 (two years after the tenure decision as to plaintiff), that person was Emilie Allan, the wife of plaintiff Majid Ghaidan Al-Khazraji Allan, and no other person in the Department who was a sociologist, the field of expertise of plaintiff, Dr. Al-Khazraji Allan, has since that time applied for, been recommended for, or been granted tenure.

The conclusion of District Judge Mencer is consistent with the principle

that the existence of the following is one of the minimum requirements for a prima facie case of discrimination in a Title VII higher education context, the requirements for a Section 1981 claim arguably being even higher:[8] "Tenure

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[8]The language used is from Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148 (D. Mass. 1980), language being adopted by the Court of Appeals at 648 F.2d 62 (1st Cir. 1981).

This articulation is for the purposes of this Petition only. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981), has in fact eased the role of defendants in employment discrimination cases. The Third Circuit in Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (en banc), describes the procedures under Burdine as follows:

> Once a plaintiff class has made out a prima facie case of discriminatory treatment, the burden shifts to the defendant to rebut the inference of discrimination by showing that the statistics are misleading or inaccurate, or by presenting legitimate, nondiscriminatory reasons for the disparity. See Texas Department of Community Affairs v. Burdine, 450 U.S.

positions in the Department of _____ at _____ College were open at the time plaintiff was denied tenure, in the sense that others were granted tenure in the department during a period relatively near to the time plaintiff was denied tenure."

Again, in the absence of evidence that tenure positions were so open at Saint Francis College, the evidence

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8 CONTINUED

> 248, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); Wetzel, 508 F.2d at 259. It is now clear that a defendant's burden is one of production, not persuasion. It is sufficient to meet that burden if the defendant's admissible evidence clearly "raises a genuine issue of fact as to whether it discriminated against the plaintiff." See Burdine, 101 S.Ct. at 1094.

Furthermore, it is, of course, not conceded that the burden of a plaintiff alleging employment discrimination is as easy in § 1981 cases as it may be in Title VII cases.

present is "so one-sided that one party [,all of the petitioners,] must prevail as a matter of law." Anderson v. Liberty Lobby, supra.

It is respectfully submitted that the effect of not affirming as a matter of law the grant of summary judgment as to the individual petitioners, especially in conjunction with the decision in Equal Employment Opportunity Commission v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985), cert. denied, _____ U.S.L.W. _____ (June 2, 1986), discussed infra in Reason IV, will likely have a devastating effect, at the very least, on the internal peer-review system in tenure deliberations and perhaps even on external review, and ultimately could affect the tenure system itself. If faculty members are to be subject to suit individually for exercising their expertise, who will willingly serve on a

tenure committee or vote negatively on a tenure application.

For the foregoing reasons, plenary consideration by this Court is essential and is respectfully requested.

IV.

The decision of the Third Circuit in determining that the District Court should reconsider the discovery rulings appealed in light of its recent decision in **Equal Employment Opportunity Commission v. Franklin and Marshall College**, 775 F.2d 110 (3d Cir. 1985), rather than affirming the denial of the discovery appealed, (a) erroneously refuses to protect the secrecy and confidentiality of the Tenure Committee proceedings and (b) raises an important question of federal law.

Let it be noted at the outset that the discovery issue need be determined only if the District Court erred in granting the motion for summary judgment. No portion of the decision of the District Court is dependent on any of the matters about which respondent-plaintiff wanted to inquire during discovery. The dispute is as to those matters which for convenience are described as the "tenure committee" issues.

The questions in dispute as to the Tenure Committee seem to fall into four general categories: (1) the vote, (2) reasons for individuals voting as each did, (3) discussions and procedures followed at the meeting(s), (4) minutes of meeting(s).

For convenience, the term question or questions will be used as a generic term to refer to the inquiries inherent in the Interrogatories, Motion for Production of Documents, and the deposition of the Tenure Committee member. Also, the discussion will be restricted to the appropriateness of allowing inquiry into the Tenure Committee proceedings, including within that term comparative data as to the credentials of successful candidates to

the extent considered by the Committee.[9]

The reasons for objecting to the questions asked are set forth in the Response to Motion For Production of Documents (91a - 99a) and Objections Of Defendant, Saint Francis College, To Certain Of Plaintiff's First Interrogatories To Defendant St. Francis College (100a - 116a) and will not be repeated here. They are incorporated herein by reference. In essence, as relevant here, the objections raise privilege and the trial court's discretion to limit and control discovery.

Comparison of the questions asked here and those asked in Equal Employment

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[9]Brief for Appellant in the Third Circuit discusses the credentials in that context and, therefore, this petition will restrict itself to that context.

Opportunity Commission v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985), cert. denied, 54 U.S.L.W. 3792 (June 2, 1986), reveals that the scope of inquiry is substantially broader here.

It is respectfully submitted that the decision in Franklin and Marshall College is incorrect and that the materials requested here on appeal to the Third Circuit should be protected from discovery.

Petitioner College was one of the Amici Curiae who joined in the Brief of 67 Colleges and Universities as Amici Curiae in Support of Petition in the Franklin and Marshall College case.

Reiteration of the reasons set forth there for granting review appears unnecessary. They have already been

called to the attention of the Court.[10]

However, it should be noted that at issue here, and in every other case where an attempt is made to invade the secrecy and confidentiality of college or university tenure committee processes, is whether or not "peer review" will continue in American higher education or whether the entire tenure process will

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[10] In his dissent to the denial of the petition for certiorari in Franklin and Marshall College, 54 U.S.L.W. 3792 (June 2, 1986), Mr. Justice White stated:

> The United States Court of Appeals for the Third Circuit rejected the asserted privilege [against the compelled production of confidential peer review materials absent a showing of facts supporting an inference of discrimination], 775 F.2d 110 (1985), which has been accepted by another Court of Appeals, see EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 337, n. 4 (CA7 1983). I would grant certiorari to resolve this conflict.

eventually be relegated exclusively to administrators, rather than primarily to teachers.[11] If the confidentiality of the proceedings and the vote is not maintained when provided for, as it is here, in the tenure rules of a college or university, those who will willingly serve on a tenure committee or who will vote negatively on a tenure application on the merits will decrease, to the

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[11]The issues related to the vote aspect were raised in the well-known James A. Dinnan case (Blaubergs v. Board of Regents of the University System of Georgia, 661 F.2d 426 (5th Cir. 1981)), where a University of Georgia professor choose to be jailed for contempt rather than reveal his vote.

Comment on the Dinnan case and its effect on the peer-review system set out in excerpts from the Suggestion For Rehearing En Bank filed by counsel for Dinnan before the United States Court of Appeals for the Eleventh Circuit (former Fifth), at 4-9, were included in the Brief of Appellees College and Gervase Cain in the District Court and the Court is invited to peruse these excerpts.

detriment of higher education in the United States.

Nationally the peer-review system commonly employs confidential votes and deliberations. The procedures here explicitly provide for such confidentiality. The Guidelines for Tenure here provide in Committee on Tenure V.C., "[The chairman] shall inform the committee that all deliberations are to be held permanently confidential." (194a)

The essence of the argument for maintaining the confidentiality of the peer review system is contained in the following excerpt from the District Court opinion in Gray v. Board of Higher Education, City of New York, 92 F.R.D. 87, 92-93 (S.D.N.Y. 1981), rev'd, 692 F.2d 901 (2d Cir. 1982). Gray, at one time the leading case upholding the secrecy of tenure committee votes, based its decision both on a privilege basis

and as a matter of the trial court's discretion to limit and control discovery. The Gray court stated, at 92-93:

> The peer review system of decision making with regard to the granting or withholding of tenure is intended to ensure that academic considerations will be of primary concern in the decision whether or not to grant tenure, and has been said to embody "the essence of academic freedom." Kundra v. Muhlenberg College, 621 F.2d 532, 547 (3d Cir. 1980). "The peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." Kunda, supra, at 548.
>
> The maintenance of the confidentiality of the decision-making process is generally an integral element of a peer review system for granting or withholding tenure. McKillop v. Regents of the University of California, 386 F.Supp. 1270, 1276 (N.D.Cal. 1975) ("Plaintiff's suggestion that full disclosure encourages more thoughtful and honest tenure evaluations represents a

somewhat utopian view of human relationships."). See, Note, Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, 69 Calif.L.Rev. 1538, 1551-52 (1981)....

* * *

The secret ballot has long been regarded as essential to any voting process which is to be free of influence and pressure from those with power and/or influence over those voting. In U.S. v. Executive Committee of the Democratic Party of Greene County, Ala., 254 F.Supp. 543 (N.D.Ala. 1966), the court stated that "[t]he secrecy of the ballot is one of the fundamental civil liberties upon which a democracy must rely most heavily in order for it to survive. This view was recognized by Congress in its passage of the National Labor Relations Act. That Act, specifically 29 U.S.C. §§ 159(e)(1) and 179(b), requires that employee votes to rescind designation of a labor organization as the employees' bargaining agent, or to accept or reject a settlement proposal, must be conducted by secret ballot. The requirement of "complete secrecy of the ballot cannot be waived." Magic Pan, Inc. v. N.L.R.B., 627 F.2d 105, 109 (7th Cir. 1980). See also N.L.R.B. v. Groendyke Transport,

Inc., 372 F.2d 137, 141-42 (10th Cir.), cert. denied, 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed 2d 993 (1967).

The basic arguments made here apply essentially to each of the four categories of questions asked.

Categories (2), reasons for individuals voting as each did, and (3), discussions and procedures followed at the meeting(s), are essentially sub-categories of Category (1), the vote, and in all probability would almost inevitable reveal votes, as well as themselves defeating the confidentiality of the tenure process. Whether Category 4, minutes of meeting(s), would violate the confidentiality aspect would, of course, depend on what is contained therein. To the extent that the minutes would also violate such confidentiality they should be treated the same as Categories 2 and 3. Thus, confiden-

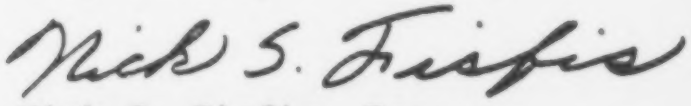
tiality should be retained as to each of the four categories of questions and the College and the witnesses should not be required to answer these questions and produce these documents.

For the foregoing reasons, plenary consideration by this Court is essential and is respectfully requested.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question 5 is presented herein, not as a reason for granting certiorari, but because determination of this issue in favor of petitioners would obviate the need for the expense and disruption of trial for the parties.

Respectfully submitted,



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July, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3205

MAJID GHAIDAN AL-KHAZRAJI,
a/k/a MAJID AL-KHAZRAJI ALLAN,

Appellant

vs.

SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RADRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities

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Appeal from the United States
District Court for the
Western District of Pennsylvania (Pittsburgh)
(D.C.Civil No. 80-1550)

Argued December 5, 1985

BEFORE: ADAMS, GIBBONS, and STAPLETON,
Circuit Judges

(Filed: March 3, 1986)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*

I.

This is an appeal from a summary judgment entered in favor of the defendants below. Appellant, Majid Ghaidan Al-Khazraji, alleges that he, a U.S. citizen, was denied tenure at St. Francis College on account of his race, religion, and national origin. On appeal, appellant's case is premised on Title VII, 42 U.S.C. § 1981 and pendent state law claims. We affirm the district court as to the Title VII claim, and reverse as to the Section 1981 and pendent claims.

II.

FACTS

Majid Ghaidan Al-Khazraji was employed for over five years as an associate professor at St. Francis College in Loretto, Pennsylvania. Al-Khazraji, who was born in Iraq, is a United States citizen and a member of the Muslim faith. He has received advanced academic degrees from Cornell University and the University of Wisconsin.

Al-Khazraji applied for tenure at St. Francis in January, 1978. On February 10, 1978, the Tenure Committee voted to recommend to the Board of Trustees that tenure not be granted. Al-Khazraji was informed of that decision and on February 23, 1978,

the Board adopted the Tenure Committee's recommendation.

On March 20, 1978, Al-Khazraji received a one-year written contract from St. Francis for the 1978-1979 academic year. This contract was not renewable beyond May 26, 1979. Al-Khazraji signed this terminal contract.

Although apparently no established procedures existed, Al-Khazraji sought internal review of this adverse decision. He did not at that time take any other action. Christian Oravec, president of St. Francis, and David McMahon, Al-Khazraji's department chairperson, advised him in a series of meetings "not to 'do anything until St. Francis made a final decision on [his] petition for reconsideration of the denial of [his] tenure application.'"[1] Al-Khazraji understood this as a request to refrain from taking action with any outside agency until he had "exhausted all of his options at the college."[2] In September, 1978, the Faculty Senate unanimously voted to permit the Faculty Affairs Committee to review the Tenure Committee's decision. The Faculty Affairs Committee did so and in January, 1979, recommended that the Faculty Senate request reconsideration of the tenure decision. On February 6, 1979, the Tenure Committee met and decided to not reconsider Al-Khazraji's application. Al-Khazraji worked his last day at the college on May 26, 1979.

On May 10, 1979, Al-Khazraji filed a suit against St. Francis in the Court of Common Pleas of Cambria County, Pennsylvania. In his complaint Al-Khazraji alleged that St. Francis had violated its own tenure

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1. Affidavit of appellant, 205a.

2. Affidavit of Thelma Grittith-Johnson, former Regional Director of the Pennsylvania Human Relations Commission ["PHRC"], Plaintiff's App. at 202a.

guidelines in denying him tenure. He also alleged that the decision was motivated by "bias, prejudice and discrimination," and that the College had improperly considered his "ethnic (Arab) and religious (Muslim) background." This lawsuit was dismissed with prejudice on October 26, 1983, for failure to prosecute. Al-Khazraji did not appeal this dismissal.

In September, 1978, almost seven months after learning of the Tenure Committee's first rejection of his application, Al-Khazraji contacted the Pennsylvania Human Relations Commission ("PHRC") and inquired about his rights under civil rights statutes. At that time, the PHRC did not docket cases which "charged termination as a result of wrongful doing until the termination had taken place. Notification of impending termination at some future date was considered insufficient reason to docket the charge or to proceed with the investigation."[3] Al-Khazraji was told that he could not file a charge with the PHRC until he had worked his last day at St. Francis College. He filed a complaint with PHRC on June 22, 1979, within thirty days of completing his final contract with St. Francis and over one year after he had first been informed of the Tenure Committee's decision. This complaint was deemed simultaneously filed with the Equal Employment Opportunities Commission.

On May 19, 1980, Al-Khazraji's PHRC complaint was dismissed. PHRC notified plaintiff of this in a letter, dated May 30, 1980, which gave two reasons for the dismissal. First, because "the alleged act(s) of discrimination occurred beyond the ninety (90) day period permitted by the statute of limitations;" second, because "Prior to filing your complaint, you took civil or criminal action that was based on the same issues

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3. Affidavit of Thelma Griffith-Johnson, App. at 202a.

as those raised in your complaint." Al-Khazraji did not appeal this dismissal.

On August 6, 1980, the EEOC issued to Al-Khazraji a right to sue letter.

III.

THE DISTRICT COURT

On October 30, 1980, Al-Khazraji filed a *pro se* complaint in the United States District Court for the Western District of Pennsylvania against St. Francis College. This complaint alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* by the college. He subsequently secured counsel and filed amended complaints naming the members of the Tenure Committee as additional defendants in their individual and official capacities. The amended complaints added allegations that the defendants had violated 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, as well as the Pennsylvania Human Relations Act, 43 P.S. § 951 *et seq.* Al-Khazraji also alleged breach of contract and intentional infliction of emotional distress under Pennsylvania law.

On February 9, 1981, Judge Ziegler dismissed Al-Khazraji's claim under 42 U.S.C. § 1986 as untimely.

On September 30, 1981, Judge Ziegler dismissed Al-Khazraji's Title VII claim as untimely, relying on *Delaware State College v. Ricks*, 449 U.S. 250 (1980). *Al-Khazraji v. Saint Francis College*, 523 F.Supp. 386 (W.D.Pa 1981). Having dismissed the Title VII claim, Judge Ziegler also dismissed the ancillary 42 U.S.C. § 1985(3) claim. However, he retained Al-Khazraji's 42 U.S.C. §§ 1981 and 1983 claims and the pendent state law claims. Defendants had argued that these federal claims were barred by statutes of limitations. Judge Ziegler disagreed, and, following *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978),

applied a six-year statute of limitations to both actions.

Judge Ziegler refused to view the Section 1981 claim as raising only a claim of discrimination based on national origin and not on race. Ziegler read Al-Khazraji's complaint as alleging that Al-Khazraji was denied tenure because he was of the "Arabian" race.[4] He held that this could serve as the basis for a civil rights action under Section 1981. 523 F.Supp. at 391-92. Al-Khazraji's case thus went forward based on Sections 1981, 1983, and the pendent state law claims.

On August 30, 1982, and October 8, 1982, the District Court denied certain requests by Al-Khazraji for discovery of the Tenure Committee's reasons for denying tenure.

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4. The district court was correct. Plaintiff's First Complaint, *pro se*, at Paragraph 7, alleges that "[defendants'] unlawful employment policy and practice consisted of refusing to renew the full-time faculty appointment of Majid G. Al-Khazraji, Ph.D., because of national origin, religion and/or race. . . ." Paragraph 8 alleges that defendants' conduct has deprived plaintiff of "equal employment opportunity and otherwise adversely affect[ed] his status as an employee because of his national origin, religion, and/or race." Plaintiff's second amended complaint, *pro se*, at Paragraph 7 alleges that "[Defendants are] depriving him of his Civil Rights...because of his national origin (Iraq), religion (Muslim) and/or race (Arabian)." The plaintiff's third complaint, which raised the Section 1981 charge, did not repeat the allegation of racial motivation. However, as Judge Ziegler observed, "[a]lthough the exact word 'race' may not appear in plaintiff's third complaint, which raised the claim under 42 U.S.C. Section 1981, plaintiff's position from the outset has been that he was subject to disparate treatment because of 'national origin, religion, and/or race.' We therefore decline to dismiss plaintiff's action under Section 1981 simply because he omitted the word 'race' in his third complaint. In our view, it is a technical defect of little significance. The thrust of plaintiff's claims, namely, that he was denied tenure by St. Francis College because he is an Arabian born in Iraq, is clear to all concerned. . . ." 523 F.Supp. at 391-92.

On November 28, 1984, defendants moved for summary judgment on the remaining issues in the case. On March 12, 1985, Judge Mencer granted summary judgment for defendants. Judge Mencer held that Al-Khazraji had not made out a *prima facie* case under Section 1981 because, since 1978, the only other person to receive tenure in the Department of Behavioral Science at St. Francis was Al-Khazraji's wife. Additionally, Judge Mencer held that a claim of discrimination on the basis of being an Arab is not cognizable under Section 1981.

Judge Mencer also dismissed the Section 1983 claim for lack of action taken under color of state law. Having dismissed the federal claims, Judge Mencer dismissed the pendent state law claims. Al-Khazraji appealed. Defendants raise a number of arguments supporting affirmance. These will be discussed seriatim.

IV.

A. Res Judicata

The Rules of Decision Act, 28 U.S.C. § 1738 requires federal courts to give a prior state court judgment the same *res judicata* effect as would be provided by the courts of that state. *Migra v. Warren City School District*, 465 U.S. 75 (1984); *Ligas v. City of Pittsburgh*, 765 F.2d 53 (3d Cir. 1985). Appellees argue that Al-Khazraji's suit in federal court is *res judicata* because of the prior state court and PHRC actions filed by Al-Khazraji. Neither contention is persuasive.

1. *Effect of The State Court Action*

Al-Khazraji's state court action never proceeded to a judgment on the merits. Rather, pursuant to Cambria County Court of Common Pleas Rule of Court

No. 33, the action was dismissed for failure to prosecute.[5] Pennsylvania courts give no *res judicata* effect to a dismissal for failure to prosecute. *See e.g.,Robinson v. Trenton Dressed Poultry Co.* ___Pa Super. ___, 496 A.2d 1240 (1985); *Bon Homme Richard Restaurants, Inc. v. Three Rivers Bank and Trust Company*, 298 Pa Super. 454, 444 A.2d 1272 (1982). Thus, the state court action is not *res judicata* to this suit.

2. Effect of PHRC Dismissal

The Pennsylvania Human Relations Act, 43 P.S. § 962(c), states:

> In cases involving a claim of discrimination, if complainant invokes the procedures set forth in this act, that individual's right of action in the courts of the Commonwealth shall not be foreclosed. If within one (1) year after the filing of a complaint with the Commission, the Commission dismisses the complaint...the Commission must so notify the complainant. *On receipt of such a notice the complainant shall be able to bring an action in the courts of common pleas of the Commonwealth based on the right to be free from discrimination granted by this act. . . .*

42 P.S. § 962(c) (emphasis added).

Appellees have not rebutted the clear statement in Section 962(c) that a dismissal by the PHRC does not

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5. "The prothonotary shall list . . . civil matters in which no steps or proceedings have been taken for two years or more prior thereto. . . . If no action is taken or no written objection is docketed in such matter prior to the general call on the first day of such court, the prothonotary shall strike the matter from the list and enter an order as of course dismissing the matter with prejudice for failure to prosecute, under the provisions of this rule."

foreclose resort to state courts. *See Nestor v. Quaker State Coca-Cola Bottling Company*, 579 F.Supp. 289 (W.D. Pa. 1984); *Fye v. Central Transportation Inc.*, 487 Pa. 137, 409 A.2d 2 (1979). Moreover, the letter received by Al-Khazraji from the PHRC dismissing his complaint read, in part: " In addition, the Pennsylvania Human Relations Act as Amended by Act 318, provides that upon receipt of this official notice, you may engage a private attorney as soon as possible and bring an action in the Court of Common Pleas for a judicial determination of your allegations of discrimination."

As a dismissal by PHRC does not foreclose resort to state courts, it does not foreclose resort to federal courts. *See Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 470 n. 7 (1982).

B. *STATUTE OF LIMITATIONS*

1. *Title VII*

Judge Ziegler, following *Delaware State College v. Ricks*, 449 U.S. 250 (1980), had dismissed Al-Khazraji's Title VII claims as untimely.[6] Subsequently, Al-Khazraji filed a motion with Judge Mencer, requesting reconsideration of that determination, and arguing that *Ricks* should not be

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6. *Ricks* held that in refusal to tenure cases, for purposes of both Section 1981 and Title VII, the act of discrimination is the making of the tenure decision and its communication to the teacher. This is true even if the teacher pursues internal grievance procedures and even if one of the effects of the denial of tenure -- the eventual loss of the teaching position -- does not occur until later. "[E]ntertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any way tentative. The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made." 449 U.S. at 261.

applied retroactively.[7] Appellant does not dispute that *Ricks*, if applied retroactively, effectively forecloses his Title VII claim.

The presumption that the holding of a case will be applied retroactively as well as prospectively is merely a corollary of the principle that federal courts should apply the law in effect at the time that cases are adjudicated. *Gulf Offshore Company v. Mobil Oil Corporation*, 453 U.S. 473, 486 n.16 (1981); *Scott v. Local 863, International Brotherhood of Teamsters*, 725 F.2d 226, 228 (3d Cir. 1984).

The district court did not err in applying *Ricks* to appellant's case. The Supreme Court applied the rule of law announced in *Ricks* retroactively both to Ricks himself and in *Chardon v. Fernandez*, 454 U.S. 6 (1981). *Ricks*, of course, arose in this Circuit. Appellant has not pointed to any point of distinction between him and Mr. Ricks to justify retroactive application of the *Ricks* principle to Ricks and not to Al-Khazraji. *See Vuksta v. Bethlehem Steel Corp.*, 540 F. Supp. 1276, 1278 (E.D.Pa 1982), *affirmed* 707 F.2d 1405 (3d Cir.), *cert. denied* 464 U.S. 835 (1983) (applying *Ricks* retroactively to cause of action arising in September, 1977).

Furthermore, *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971), which discusses the criteria for deciding whether to except a particular holding from the presumption favoring retroactivity, favors retroactive application of *Ricks*. *See Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985); *Smith v. City of Pittsburgh*,

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7. At oral argument before this court, Al-Khazraji argued that defendants are estopped from raising the statute of limitations by principles of equitable estoppel. This was not argued to Judge Ziegler, and at that time, there was no factual basis for estoppel in the record. Our review, of course, is confined to the record as it existed before Judge Ziegler when he dismissed the Title VII claim.

764 F.2d 188 (3d Cir.), *cert. denied* ___ U.S. ___, 106 S.Ct. 349 (1985). We need only discuss the first step of the *Chevron* analysis. In order to justify nonretroactive application, the judicial decision must announce a new principle of law that either overrules clear past precedent or decides an issue of first impression whose resolution was not clearly foreshadowed. *Chevron*, 404 U.S. at 106-07.[8]

When evaluating the state of the prior law, it is necessary to look to the time when the plaintiff's cause of action arose. If there is a clear precedent at that time upon which plaintiff might reasonably have relied in delaying suit, it is unfair to overturn that reliance after it is too late for the plaintiff to do anything about it.

The *Ricks* case originated in the District of Delaware. Prior to the Third Circuit's decision in *Ricks v. Delaware State College*, 605 F.2d 710 (3d Cir. 1979), *reversed* 449 U.S. 250 (1980), there was no precedent in this Circuit on which appellant could reasonably have relied. The Third Circuit opinion was issued on September 18, 1979, eighteen months after the initial tenure decision had been communicated to appellant.

The clearest example of the state of the law on this matter at the time Al-Khazraji's claim arose is the District Court opinion in *Ricks*, 22 BNA FEP Cases 788 (D. Del. 1978), *motion for reconsideration denied*, 22 BNA FEP Cases 793 (D. Del. 1978), *rev'd*, 605 F.2d 710 (3d Cir. 1978), *rev'd* 449 U.S. 250 (1980) (*aff'g* district court). The district court judge there found that *Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977), a case arising under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* controlled. He read *Meyers* as leading to the

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8. See pp. 16-23 *infra* for further discussion of the *Chevron* analysis.

conclusion that the alleged discriminatory acts at issue were the denial of tenure and the award of the terminal contract, not the subsequent termination of employment.

Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3d Cir.), *cert. denied*, 439 U.S. 821 (1978), cited by Al-Khazraji, could not have provided him with any assurance that his final day of employment would be considered as the unlawful employment practice for Title VII. *See Ricks v. Delaware State College*, 22 FEP Cases 793 (D.Del. 1978) (discussing why *Bonham* does not apply).

Thus, Al-Khazraji cannot claim that, prior to the Third Circuit's decision in *Ricks*, there was any clear precedent on which he could have relied in delaying to file his federal action. Because Appellant had no grounds for reasonable reliance on a contrary rule, it is not inequitable to apply *Ricks* retrospectively.

2. *The Section 1981 Claim Against Appellee St. Francis College*

a. *Retroactive Application of Goodman v. Lukens Steel*

Appellees contend that Al-Khazraji's Section 1981 claim is barred by the statute of limitations. We disagree.

Because Section 1981 refers to no specific federal limitations period, federal courts are obligated to borrow the state limitations period which is applied to the state cause of action most analogous to the civil rights cause of action, so long as it is not deleterious to the federal rights involved. *Johnson v. Railway Express Agency*, 421 U.S. 454, 464-65 (1975); *See Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Swietlowich v. County of Bucks*, 610 F.2d 1157, 1162 (3d Cir. 1979).

This Circuit, from at least 1977 until 1985, had applied Pennsylvania's six-year statute of limitations in discrimination cases brought under Section 1981. *See Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977); *Wilson v. Sharon Steel Corporation*, 549 F.2d 276 (3d Cir. 1977). Judge Ziegler, in his opinion below, properly applied the six-year limitations period to plaintiff's claim. Neither he nor this court foresaw the Supreme Court's recent ruling in *Wilson v. Garcia*, ___ U.S. ___, 105 S.Ct. 1938 (1985). *See Goodman v. Lukens Steel*, 777 F.2d 113, 118 (3d Cir. 1985).

However, *Wilson v. Garcia* has made it necessary for this court to re-examine its prior decisions. Consequently, in *Goodman*, we held that the Supreme Court's ruling mandated that Pennsylvania's statute of limitations for personal injuries be applied to actions brought under Section 1981. This is a two-year statute of limitations. 42 P.S. § 5524.

As noted above, the general presumption is that federal courts should apply the law in effect at the time that cases are adjudicated. *Gulf Offshore Company*, 453 U.S. at 486 n. 16; *Scott*, 725 F.2d at 228.

Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971), sets forth the criteria for deciding whether to apply retroactively the holding of a case. *See Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985); *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir.) *cert. denied* ——— U.S. ———, 106 S.Ct. 349 (1985). *Chevron* requires the federal courts to undertake a three-part analysis:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly

> foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retrospective application, for [w]here a decision of this Court could produce substantially inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).
We must evaluate these three factors in light of Al-Khazraji's claim.

1. *The Change from Prior Law*

The first *Chevron* factor requires that the prior law have been sufficiently clear that the plaintiff could have reasonably relied upon it in delaying suit. *Fitzgerald v. Larson*, 769 F.2d at 163. In 1973, when the complaint was filed in the *Goodman* case, there was no established precedent in the Third Circuit to indicate the appropriate limitations period for Section 1981 claims.[9] However, when the cause of action in Al-Khazraji's case arose, in early 1978, this was no longer true.

In *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977) the Third Circuit

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9. The cause of action that was the basis for the *Goodman* case arose in May, 1970. *Goodman*, 777 F.2d at 121, at n.4. The conclusion that *Goodman* is to be retroactively applied to the plaintiff in *Goodman* itself does not mandate that *Goodman* be retroactively applied to this plaintiff. The crucial distinction between the situation in *Goodman* and that involved here is the relative clarity of this Circuit's law regarding the proper limitations period. In 1970, that law was not clear. However, as discussed below, this had changed by the time Al-Khazraji's claim arose.

definitively applied Pennsylvania's six-year statute of limitations to a Section 1981 action. *Meyers* concerned a racially-motivated refusal to sell a house to plaintiff, a black man. The Court analogized Meyers' claim to a tort action involving "the wrongful interference with another's financial, commercial, or business rights. A victim of one of these torts suffers not so much from an emotional or mental trauma as he does from the actual denial of his right to lawfully pursue his business, employment, or personal affairs. Meyers appears to complain of just such a denial." 559 F.2d at 902. Having reached this conclusion, the court had no trouble in identifying the related six-year statute of limitations for contract actions and applying it to Meyers' claims. *Id* at 903: *See Wilson v. Sharon Steel Company*, 549 F.2d 276 (3d Cir. 1977); *Collier v. Philadelphia Gas Works*, 441 F.Supp. 1208, 1212 (E.D.Pa 1977); *Pierce v. Catalytic*, 430 F. Supp. 1180, 1182 (E.D.Pa 1977)

After *Meyers* and *Wilson*, a potential plaintiff whose complaint was based on "the denial of his right to lawfully pursue his . . . employment" could be fairly confident that a federal court in this Circuit would apply Pennsylvania's six-year statute of limitations to his or her section 1981 claim.

Although there were some earlier cases that borrowed a shorter limitations period for Section 1981 actions, *see Wilson v. Sharon Steel Corporation*, 399 F. Supp. 403 (W.D.Pa. 1975), *rev'd* 549 F.2d 276 (3d Cir. 1977); *Davis v. United States Steel Supply Company*, 405 F. Supp. 394 (W.D.Pa. 1976), *rev'd* 581 F.2d 335 (3d Cir. 1978); *Presseisen v. Swarthmore College*, 71 F.R.D. 34 (E.D.Pa 1976), by 1977 the district courts were uniformly applying the six-year limitations period for actions alleging interference with contractual rights. *See Collier*, 441 F.Supp. at 1212; *Groves v. Insurance Company of North America*, 433

F.Supp. 877, 884 (E.D.Pa 1977); *Pierce v. Catalytic, Inc.*, 430 F. Supp. at 1182; *see also Jones v. United Gas Improvement Corporation*, 383 F.Supp. 420, 430-31 (E.D.Pa 1974).

Just a few months after Al-Khazraji was informed of the Tenure Committee's decision, the Third Circuit, in *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978), made it absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination. *See Liotta v. National Forge Company*, 629 F.2d 903, 906 (3d Cir. 1980), *cert. denied* 451 U.S. 970 (1981); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470 (3d Cir. 1978), *cert. denied* 444 U.S. 832 (1979). Thus, unlike the state of the law regarding the proper limitations period for Section 1983 actions, in early 1978 the precedents were sufficiently clear that Al-Khazraji could reasonably have relied upon them when deciding to delay filing his Section 1981 claim. *Compare Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985).[10]

For this reason, when the *Goodman* case was decided, it established a new principle of law and overruled clear past precedent on which litigants reasonably could have relied. When Appellant allegedly was discriminated against, and for several years after

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10. The 1978 change in the Pennsylvania law does not affect this conclusion. Effective June 27, 1978, a new statute of limitations went into effect in Pennsylvania. 42 P.S. Section 5527, which set forth a six-year limitations period for actions upon a contract, did not change the limitations period applicable under the prior law, 12 P.S. Section 31 (repealed). As Judge Ziegler noted below, there was nothing in the change to suggest that Pennsylvania intended that a shorter limitations period be substituted for the six-year period that formerly had applied to actions for breach of employment. 523 F. Supp. at 389-90; *See Villoa v. City of Philadelphia*, 95 F.R.D. 109, 114 (E.D.Pa. 1982).

he had initiated his federal action, these decisions represented the law governing his case. "It cannot be assumed that he did or could foresee that this consistent interpretation . . . would be overturned. The most he could do was to rely on the law as it then was. 'We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights.' *Griffin v. Illinois*, 351 U.S. 12, 26 (Frankfurter, J., concurring in the judgment)." *Chevron*, 404 U.S. at 107.

ii. *The Purposes of Goodman*

Wilson v. Garcia, ___U.S.___, 105 S.Ct. 1938 (1985), made the *Goodman* decision inevitable. In *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir.) *cert. denied* ____ U.S. ____, 106 S.Ct. 349 (1985), we analyzed the purposes of *Wilson* and concluded that it was intended to promote uniformity and the minimization of unnecessary litigation. 764 F.2d at 196. *Smith* found that the policies informing *Wilson* did not militate clearly either in favor of or against retroactive application. *Id. See Fitzgerald v. Larsen*, 769 F.2d at 164. The purposes of *Goodman* are the same as those of *Wilson v. Garcia*. Consequently, *Goodman* also is neutral in resolving this question.

iii. *The Equities of Retroactive Application of Goodman*

The third *Chevron* factor is whether retroactive application will achieve harsh, unjust, or inequitable results. *Fitzgerald*, 769 F.2d at 164. In *Fitzgerald*, Judge Sloviter observed that this factor overlaps with the first *Chevron* factor, for it would be inequitable to give retroactive application to a "shortening of the limitations period that altered established law upon which plaintiff could have reasonably relied." *Id.*

We have already decided that retroactive application of *Goodman* would defeat the reasonable expectations of those, like Al-Khazraji, who relied upon the *Davis* line of cases. "[I]t would produce the most 'substantial inequitable results' to hold that [Appellant] 'slept on his rights' at a time when he could not have known the time limitation that the law imposed on him." *Chevron*, 404 U.S. at 108 (citation omitted). Al-Khazraji's position is even more compelling. In 1981, because the district court applied the clear pre-*Goodman* rule, Al-Khazraji survived defendants' motion to dismiss the Section 1981 claims as untimely under a two-year statute of limitations. 523 F.Supp. at 386. If Judge Ziegler had ruled differently and then dismissed the pendent state claims, Al-Khazraji perhaps would not have permitted the state court non pros to be entered. Retroactive application of *Goodman* would probably compel dismissal of those pendent claims, as Section 1981 is the only federal cause of action left to Al-Khazraji. However, it may be too late for Al-Khazraji to rescue his state lawsuit. Because we cannot say whether Pennsylvania would permit him to reinstate that suit in state court, it seems possible that this might prevent him from litigating those claims. This seems to be a harsh result.

iv. *Goodman Is Not To Be Applied Retroactively to Al-Khazraji's Section 1981 Claim*

Because we find two of three *Chevron* factors present and the third neutral on this issue, we hold that, at least as to persons whose causes of action arose after 1977, *Goodman* should not be applied retroactively to alter the applicable Pennsylvania statute of limitations from six to two years. Thus, Al-Khazraji's federal lawsuit, filed in 1980, was timely. *Accord Elliott v. Group Medical and Surgical Care*, 714 F.2d 556, 563 (5th Cir. 1983), *cert. denied* — U.S. —, 104 S.Ct. 2658 (1984) (New judge-made rules

on limitations are usually not to be applied retroactively to a plaintiff who timely filed his complaint under the then-existing law of limitations).

C. *THE SECTION 1981 CLAIM*

1. *Race and The Section 1981 Claim*

Defendants next argue that Plaintiff may not sue under Section 1981 because Arabs are not a "protected minority." They argue that an ethnic Arab is taxonomically a Caucasian and therefore "not a protected person under Section 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him."

We disagree and hold that ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them.[11]

The starting point of our analysis is the statute itself. 42 U.S.C. § 1981 provides that:

> All persons within the Jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The defendants argue that because Arabs are taxonomically Caucasians, they are therefore "white citizens" for purpose of Section 1981 and *a fortiori*, Section 1981 offers them no greater protection than they enjoy absent Section 1981.

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11. We do not reach the issue of Section 1981's applicability to claims of national origin discrimination. When the record is fully developed, it may or may not be necessary for the district court to address that issue.

The Supreme Court has ruled that individuals who are not black, but who have been victims of racial discrimination can sue under Section 1981. *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976). *McDonald* rejected the argument that Section 1981 is limited to the protection of nonwhites against racial discrimination. 427 U.S. at 287-96. The protection against racial discrimination thus extends beyond those who are taxonomically members of the Negro race. Appellant is therefore not prevented from invoking Section 1981 merely because he is taxonomically classified as a member of the Caucasian race. *Compare LaFore v. Emblem Tape and Label Company*, 448 F.Supp. 824, 826 (D.Col. 1978) (equating "white citizens" with a racial classification is "utterly lacking in sophistication. There is no scientific justification for the equation."). However, the Supreme Court did not make clear how the lower courts were to recognize the sort of discrimination proscribed by Section 1981.[12] Therefore, we turn for guidance to the legislative history.

Section 1981 was originally enacted as part of Section 1 of the Civil Rights Act of 1866, authorized by Section 2 of the thirteenth amendment to the United States Constitution. Because of doubts over Congress' authority to pass the Civil Rights Act of 1866, it was subsequently reenacted following the adoption of the fourteenth amendment as Section 18 of the Civil Rights Act of 1870, c.144 Section 18, 16 Stat. 144 (May 31, 1870). *See Jones v. United Gas Improvement*

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12. The Supreme Court, while it has often stated that Section 1981 exists to remedy racial discrimination, has never precisely defined its conception of "race." *See Johnson*, 421 U.S. at 459-60; *McDonald*, 427 U.S. at 287; *Jones*, 392 U.S. at 413; 2189; *Georgia v. Rachel*, 384 U.S. 780, 791, (1966).

Corporation, 68 F.R.D. 1, 10-11 (E.D.Pa 1975). Accordingly, Section 1981 has some ties to the fourteenth as well as to the thirteenth amendment. *Croker v. Boeing Company*, 662 F.2d 975 (3d Cir., 1981).

The Civil Rights Act of 1866 was directed primarily against the mistreatment of blacks by private individuals. *See Jones v. Alfred H. Mayer Company*, 392 U.S. 409, 427-28 (1968). Nevertheless, the bill was designed to ensure a more encompassing protection. Senator Trumbell introduced the bill as a measure "to protect *all persons* in the United States in their civil rights. . ." Cong. Globe, 39th Congress, 1st Sess., 211 (1866) (emphasis added). Senator Trumbell described the bill as applying to "every race and color." *Id. See also McDonald*, 427 U.S. at 288 n.19. Senator Howard described the bill's object as to give "to persons who are of different races or colors the same civil rights." Cong. Globe, 39th Congress, 1st Sess., at 504.

In The House of Representatives, Representative Wilson argued for passage of the bill on the grounds that it would "protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." Cong. Globe, 39th Cong., 1st Sess. at 1118. He claimed that the bill would ensure "the equality of citizens . . . in the enjoyment of 'civil rights and immunities.'" and "secure[] to citizens of the United States equality in the exemptions of the law. . . . Whatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than another." Cong. Globe, 39th Cong., 1st Sess. at 1117. *See* remarks of Senator Hendricks, *Id.* at 601; Remarks of Representative Shallabarger, *Id.* at 1293; *see also Jones*, 392 U.S. at 436 ("[T]he Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not

under color of state law, with respect to the rights enumerated therein").

It was the measure's breadth that led to the amendment of the bill to include the limitation of the rights to those enjoyed by white citizens. Representative Wilson, who proposed the amendment, Cong. Globe, 39th Cong., 1st Sess. at 1115, explained the purpose of the amendment was to avoid extending these rights to "all citizens, whether male or female, majors or minors." *Id.* at App. 157, *quoted in McDonald*, 427 U.S. at 293. The Supreme Court has observed that this amendment "indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966); *see Johnson v. Railway Express Agency*, 421 U.S.454, 459-60 (1975) ("Section 1981 affords a federal remedy against private discrimination on the basis of race").

Representative Shallabarger stated that the effect of the amended bill was:

> to require that whatever rights as to each of those enumerated civil . . . matters the States may confer upon one race or color of the citizens shall be held by all races in equality. Your state may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not so as to one race, you shall treat the other likewise. . . . It secures - - not to all citizens, but to all races as races who are citizens -- equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races.

Cong. Globe at 1293.

Representative Shallabarger's discussion of the bill made it clear that he was not using the terms "race" or "color" in a crabbed fashion or to signify only those races identified by anthropologists as distinct. Cong.

Globe, 39th Cong., 1st Sess., at 1294. Shallabarger's conception of the bill's scope was much broader, and clearly not limited to a taxonomic definition of the key term in the bill.

> Who will say that Ohio can pass a law enacting that no man of the German race, and whom the United States has made a citizen of the the United States, shall ever own any property in Ohio, or shall ever make a contract in Ohio. . . . If Ohio may pass such a law, and exclude a German Citizen, not because he is a bad man or has been guilty of a crime, but because he is of the German nationality or race, then may every other state do so; and you have the spectacle of an American Citizen admitted to all its high privileges and entitled to the protection of his Government in each of these rights, and bound to surrender life and property for its defense, and yet that citizen is not entitled to either contract, inherit, own property, work, or live upon a single spot of the Republic, nor to breathe its air.

Id.

This review of the legislative history convinces this court that Congress did not intend to limit Section 1981 solely to those who could demonstrate that they had been discriminated against because they belonged to a particular group identified and described by anthropologists. When Congress referred in the statute to "race," it plainly did not intend thereby to refer courts to any particular scientific conception of the term. In fact, there is no precise definition of the word.[13]

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13. The dictionary provides an example of the lack of precision in the term.

> Race. A group of persons, animals, or plants, connected by common descent or origin; a tribe, nation, or people, regarded as of common stock; a group of several tribes or

We believe that Congress's purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive.[14]

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peoples, forming a distinct ethnical stock; one of the great divisions of mankind, having certain physical peculiarities in common. 2 OXFORD ENGLISH DICTIONARY 2400 (1971, Compact Ed.).

Race. 1. Any of the different varieties of mankind, distinguished by form of hair, color of skin and eyes, stature, bodily proportions, etc.; many anthropologists now consider that there are only three primary major groups, the Caucasoid, Negroid, and Mongoloid, each with various subdivisions (sometimes also called *races*); the term has acquired so many unscientific connotations that in this sense it is often replaced in scientific usage by *ethnic stock* or *group*.

2. a population that differs from others in the relative frequency of some gene or genes. . .

3. any geographical, national, or tribal ethnic grouping. . . .

5. any group of people having the same activities, habits, ideas, etc. WEBSTER'S NEW WORLD DICTIONARY 1169 (1972 Ed.)

14. *See Gonzalez v. Stanford Engineering Inc.*, 597 F.2d 1298, 1300 (9th Cir. 1979): "A substantial portion of the Mexican population traces it roots to a mixture of the Caucasian (Spanish) and Native American races. With this background prejudice towards those of Mexican descent having a skin color not characteristically Caucasian must be said to be racial prejudice under 1981." But see *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970 (10th Cir. 1979). (Though Mexican Americans not technically another race, community attitudes differentiating Hispanics from "Anglos" are sufficient to bring care within Section 1981 because these attitudes are enough like racial prejudice.)

Some courts, in struggling with this definitional problem, have concluded that it is impossible to distinguish "race" from considerations of "national origin." This is because they have concluded that "[t]he notion of race is a taxonomic device and, as with all such constructs, it exists in the human mind [and] not as a division in the objective universe." *Ortiz v. Bank of America*, 547 F. Supp. 550, 565 (E.D. Calif. 1982). Thus, in their view, the separation of *homo sapiens* into subgroups is largely determined by the reasons for the separation.[15]

While the distinction between racial discrimination, which is cognizable under Section 1981, and other types of discrimination, which may not be cognizable, may in some instances be obscure, that cannot justify refusing to attempt the distinction. Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*.

Because Al-Khazraji was unable to conduct full discovery prior to the defendants' motion for summary judgment, we do not have before us a sufficent record to determine whether he has been subjected to the sort

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15. "Just what constitutes a race is a hard question to answer, since one's classification usually depends on the purpose of classification." Thus a group of scientists after developing a list of "racial types" emphasized that the list "of 30 'races' might have been ten or 50; the line of discrimination in many cases is arbitrary. . . . If this list does nothing else, we hope that it will bring home to the student the realization that race is not a static thing at all. . . ." *Ortiz*, 547 F. Supp. at 565 [citations omitted]. *See Cubas v. Rapid American Corp.*, 420 F.Supp. 663, 666 n.2 (E.D.Pa. 1976); *compare Anoaya v. Hilton Hotels Corporation*, 733 F.2d 48 (7th Cir. 1984) (absent allegation of racial animus, national origin discrimination not cognizable under Section 1981); *Budinsky v. Corning Glass Works*, 425 F.Supp. 786, 788-89 (W.D.Pa. 1977)

of prejudice that Section 1981 would redress as being impermissibly racially-based.[16] However, where a plaintiff comes into federal court and claims that he has been discriminated against because of his race, we will not force him first to prove his pedigree. We are unwilling to assert that Arabs cannot be the victims of racial prejudice: "prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is a usage or image based on all the mistaken concepts of 'race.'" *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979).[17]

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16. Appellant has appealed certain of the district court's discovery rulings. On remand, the District Court should reconsider those rulings in light of this court's recent decision in *Equal Employment Opportunity Commission v. Franklin and Marshall College*, 775 F.2d 110 (3d Cir. 1985).

17. Other courts have allowed "non-traditional" Section 1981 plaintiffs to raise claims of race discrimination. *See, e.g., Gonzalez v. Stanford Applied Engineering*, 597 F.2d 1298 (9th Cir. 1979) (plaintiff of Mexican descent having skin color "not characteristically Caucasian"); *Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183 (N.D. Ill. 1983) (East Indian); *Pollard v. City of Hartford*, 539 F. Supp. 1156 (D.C. Conn. 1982) (Hispanic); *Baruah v. Young*, 536 F. Supp. 356 (D.M.D. 1982) (Native of India having skin color not characteristically white); *Aponte v. National Steel Service Center*, 500 F. Supp. 198 (N.D. Ill. 1980) (Mexican-American); *Tayyari v. New Mexico State University*, 495 F.Supp. 1365 (D.N.M. 1980) (Iranian); *Khawaja v. Wyatt*, 494 F.Supp. 302 (W.D.N.Y. 1980) (Pakastani-American); *Lopez v. Sears, Roebuck & Co.*, 493 F. Supp. 801 (D. M.D. 1980) (non-white (brown) Spanish surnamed Malay); *Ridgeway v. Inter. Broth. of Elec. Wkrs.* 466 F. Supp. 595 (N.D. Ill. 1979) (Hispanic); *Cubas v. Rapid American Corp.*, 420 F.Supp. 663 (E.D.Pa 1976) (Cuban-American); *Miranda v. Amalgamated Clothing Workers*, 8 CCH EPD ¶ 9601, BNA FEP Cases 557 (D. N.J. 1974) (Puerto Rican). *Compare Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D.Pa 1977) (plaintiff of Slavic national origin not able to state a cause of action for race discrimination); *Kurylas v. United States Dept. of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974) aff'd 514 F.2d 894 (D.C. Cir. 1975) (same-Polish American).

Accordingly, Al-Khazraji should be allowed the opportunity to prove that the discrimination he alleges is racially motivated within the meaning of Section 1981.

2. *Liability of the Individual Defendants Under Section 1981*

The district court found that the individual defendants, who are members of the tenure committee, are not the employers of plaintiff and so cannot be sued under Section 1981 or on the pendent state claims. We disagree. Although Section 1981 is a federal civil rights remedy it is in the nature of a tort remedy. *Goodman*, 777 F.2d at 119-20.

An individual, including a director, officer, or agent of a corporation, may be liable for injuries suffered by third parties because of his torts, regardless of whether he acted on his own account or on behalf of the corporation. "An officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefore." *Zubik v. Zubik*, 384 F.2d 267, 275-76 (3d Cir. 1967), *cert. denied* 390 U.S. 988 (1968). *See* Restatement (Second) of Agency § 343 (1957).

In particular, directors, officers, and employees of a corporation may become personally liable when they intentionally cause an infringement of rights protected by Section 1981, regardless of whether the corporation may also be held liable. *See Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 141, 1146 (4th Cir. 1975); *Faraca v. Clements*, 506 F.2d 956, 959 (5th Cir.), *cert. denied* 422 U.S. 1006 (1975); *See also Weaver v. Gross*, 605 F.Supp. 210, 212-13 (D.D. Col. 1985); *Gladden v. Barry*, 558 F.Supp. 676, 678 (D.D. Col. 1983); *Jeter v. Boswell*, 554 F. Supp. 946, 951-53 (N.D.W Va 1983).

If individuals are personally involved in the discrimination against the Appellant, and if they

intentionally caused the College to infringe on Appellant's Section 1981 rights, or if they authorized, directed, or participated in the alleged discriminatory conduct, they may be held liable. *See Manuel v. International Harvester Company*, 502 F.Supp. 45 (N.D. Ill. 1980); *Coley v. M & M Mars, Inc.*, 461 F. Supp. 1073 (M.D. Ga 1978); *see also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236-37 (Section 1982 suit permitted against corporation and its directors).

D. *PENDENT STATE CLAIMS*

After dismissing Al-Khazraji's federal claims and thereby eliminating the basis for pendent jurisdiction, the District Court dismissed the pendent state claims. Because we are reinstating appellant's Section 1981 claim, upon remand the district court must reconsider the pendent state claims. When the district court dismissed the pendent claims, it expressed, in dictum, its views on the merits of the pendent claims.

The district court believed that, because the individual members of the Tenure Committee were not the appellant's employer, they could not be liable to appellant for breach of an employment contract, for intentional infliction of emotional distress, or for violations of the Pennsylvania Human Relations Act.

We agree that because the individual members of the tenure committee were not parties to any employment contract between Al-Khazraji and St. Francis College, they may not be sued on the contract for breach. However, Al-Khazraji has not alleged breach of contract against these individuals.[18]

However, we do not agree that the individual defendants, merely because they were not Al-Khazraji's employer, cannot under any circumstances be liable for

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18. Appellant's Amended Complaint, Count III par. 49.

intentional infliction of emotional distress. This tort does not require contractual privity. *See Bruffett v. Warner Communications, Inc.*, 692 F.2d 910, 914 (3d Cir. 1982).[19] Our understanding of the Pennsylvania Human Relations Act leads us to the same conclusion regarding it. *See* 43 P.C.S.A. §§ 955(e), 962(c).

V.

The judgment of the district court will be reversed and the case remanded for proceedings consistent with this opinion.

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19. Upon remand, the parties may want to consider whether this count is time-barred, an issue on which we express no opinion. *See Bruffett*, 692 F.2d at 914.

ADAMS, J., *concurring*.

As a matter of social policy, I have no dispute with the panel's position: I wholeheartedly favor laws prohibiting all types of invidious discrimination. As a matter of legislative interpretation, however, I question the panel's conclusion in Part III(c)(1) that Congress, in enacting § 1981, intended that a plaintiff would be able to establish a claim based on anti-Iraqui or anti-Arab discrimination. I join in the panel's holding nonetheless because I believe it is a not-unreasonable alternative given the Supreme Court's interpretation of § 1981. I disagree with that interpretation, however, and I also have strong reservations about the implications of this decision, which in large part would seem to follow from the Supreme Court's construction.

Enacted in the aftermath of the Civil War, which was fought to a great extent over slavery, § 1981 was intended to place blacks on an equal footing with whites by prohibiting racial discrimination in private contracts. *See Jones v. Alfred H. Mayer Company*, 392 U.S. 409, 427-28 (1968). Based on my reading of the statute, its legislative history, and the broader historical context in which it was enacted, I am persuaded that Congress designed its protections to apply solely to blacks. Admittedly there may have been one or two Congressmen like Senator Shellabarger, who wished to go further. But nothing in the legislative history indicates that such a stance represented the view of the majority in Congress.

An interpretation of § 1981 that would confine its coverage to blacks charging racial prejudice, however, would now seem to be precluded by *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976). There, the Supreme Court held that white plaintiffs seeking to challenge so-called reverse discrimination could maintain suit under § 1981.

Rejecting the position that the Act was designed solely to protect blacks, the Court declared that the 39th Congress "was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *Id.* at 295. The prospect of discrimination against whites may have appeared highly unlikely at the time, the Supreme Court stated, yet the statute created a principle that prohibited such unequal treatment: "the Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *Id.* at 295.

McDonald does not directly control the case at hand, to be sure. It simply holds that § 1981 was intended to protect not only blacks but also members of other "races," and that white plaintiffs may therefore bring suit under it. The present case could be distinguished. Here, it might be argued, the plaintiff, although a Caucasian, does not claim to be discriminated against as a Caucasian, as in *McDonald*; rather, he alleges that he was discriminated against as an Arab or an Iraqui. And discrimination against Arabs or Iraquis, the argument would conclude, is not *racial* discrimination cognizable under § 1981.

The problem with this position is that it rests on a technical definition of race as black and white, or perhaps black, white and yellow, in keeping with the classic anthropological definition of race as the three major groups, Caucasoid, Negroid and Mongoloid. I agree with the panel that there is no evidence that Congress intended a narrow scientific definition of race when it passed § 1981. Moreover, adopting an anthropological definition would lead to anomalous results: while a white would be able to claim anti-white discrimination under the statute, for example, a

Mexican-American or an Indian would be unable to make out a claim, unless they contended they were unfairly treated by virtue of being Caucasians.

Having rejected a narrow definition of race, the majority comes forward with a much broader one. Race, it concludes, means "membership in a group that is ethnically and physiognomically distinctive." Ante at ___. I do not believe the Court should be conducting this definitional exercise to begin with, because in my view the statute was designed solely to protect blacks. But since *McDonald* appears to have removed that option, and of necessity forces a selection of some definition of race, the one selected by the majority seems more sensible than the anthropological approach.

Yet it too leads to troubling results. Now, in any suit under § 1981, a jury may be asked to determine whether the plaintiff has been subjected to discrimination as a result of belonging to a group that is "ethnically and physiognomically distinctive" -- a rather far cry from the language of, and the purpose behind, § 1981. Although the panel stops short of holding that national origin discrimination is encompassed by § 1981, virtually any nationality can be seen as ethnically and physiognomically distinctive. The result, I believe, constitutes a dramatic expansion in the number of plaintiffs who may now proceed under the statute, well beyond what Congress intended when it passed the law.[1] In effect, a statute aimed at

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1. In light of the continual flow of immigrants to the United States, the consequences of this expansion are quite substantial. Persons from most of the Middle East and Asia, for example, would now appear able to sue under § 1981. As of 1980, there were 2,539,800 persons born in Asia living in the United States, as well as 43,400 from Egypt and 71,500 from North Africa. United States Department of Commerce, Bureau of Census, *Statistical Abstract of the United States* (1985), at

racial discrimination is being converted into one also focused on national origin discrimination.

I agree that prohibiting private discrimination based on national origin, as Title VII expressly does, is salutary: indeed, prohibiting any type of invidious discrimination is salutary. I also realize that it may be tempting for federal judges to "interpret" the statute to achieve the desired result. Because we are not directly answerable to the voters, however, we are not well suited to make what is essentially a policy choice. That task, under our system of government, is assigned to Congress, the branch of government that is most representative of the people. And the more judges succumb to the temptation to make such policy choices under the guise of interpretation, the more we risk diminishing confidence in our judgments. In light of the Supreme Court's decision in *McDonald*, however, I am constrained to join the result reached by the panel.

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87. I do not mean to suggest that this inflow is in any way undesirable; the figures, rather, point up the extent of the expansion of the statute, which underpins, I believe, the need for Congress, as opposed to the judiciary, to decide on the appropriateness of this result.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,	)	
Plaintiff	)	
v.	)	Civil Action No. 80-1550
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, Individually and in their official capacities,	)	
Defendants	)	

MEMORANDUM OPINION

Three complaints have been filed on behalf of plaintiff at the above-captioned civil action number. As a result of prior rulings by the Court, the operative complaint is the second complaint labeled "Amended Complaint." This complaint was filed by prior counsel

for plaintiff on November 7, 1980 against defendants, Saint Francis College, and nine members of its faculty and administration, individually and in their official capacities. This Amended Complaint is in three counts. Count I charges a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Count II charges a violation of 42 U.S.C. § 1985(3) and 1986. While Paragraph 2 of the Amended Complaint states that this action arises under 42 U.S.C. §§ 1981, 1983, 1985(3), and 2000e, Count II in the Claims for Relief portion of the Amended Complaint restricts itself to 42 U.S.C. §§ 1985(3) and 1986. Count III raises certain state claims, which are alleged to be pendent to the federal claims.

Also as a result of prior orders of Court by Judge Ziegler in response to motions by defendants, which motions in

effect were motions to dismiss, the only remaining claims of plaintiff are those predicated on 42 U.S.C. §§ 1981 and 1983, and the pendent state claims.

On November 28, 1984, counsel for defendants filed a Motion for Summary Judgment.

42 U.S.C. § 1981 Claim

Proof of intent and purposeful discrimination are necessary elements of a § 1981 claim. Croker v. Boeing Company, 662 F.2d 975 (3d Cir. 1981).

During the academic year at issue, Academic Year 1977-1978, no other person in the Department of Behavioral Science was recommended for tenure by the Committee on Tenure or granted tenure by the Board of Trustees, no other person in the Department was recommended for, and granted, tenure until Academic Year 1979-1980 (two years after the tenure decision as to plaintiff), that person was Emilie

Allan, the wife of plaintiff Majid Ghaidan Al-Khazraji, also known as Majid Al-Khazraji Allan, and no other person in the Department who was a sociologist, the field of expertise of plaintiff, Dr. Al-Khazraji Allan, has since that time applied for, been recommended for, or been granted tenure.

Additionally, plaintiff does not qualify as a member of a protected minority under § 1981. Section 1981 is generally considered to apply only to racial and alienage discrimination, 3 A. Larson, Employment Discrimination, § 71.00 et seq.; 4 A. Larson, Employment Discrimination, § 94.00 et seq. The Amended Complaint alleges discrimination on the basis of national origin and religion, and not on the basis of race or alienage. Accordingly, the alleged acts of discrimination here are not within the scope of 42 U.S.C. § 1981.

Even if the Amended Complaint were to be read as making a racial claim under § 1981, plaintiff factually does not qualify as a protected minority member. At his deposition plaintiff stated:

> Q. Are you also taking the position that you were denied tenure because of your race?
>
> A. Yes.
>
> Q. What is your race?
>
> A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion.

Plaintiff is claiming that he was discriminated against because of his national origin, Iraq, his ancestry, Arabian, and his religious creed, Muslim. A claim of discrimination on the basis of being an Iraqi or Arab is not cognizable under § 1981. Ibrahim v. New

York State Department of Health, 581 F. Supp. 228 (E.D.N.Y. 1984).

Accordingly, we must conclude that plaintiff is unable to establish a prima facie § 1981 case.

42 U.S.C. § 1983 Claim

As to the alleged violation of 42 U.S.C. § 1983, it is essential that the plaintiff allege and prove that the defendants acted under the color of state law. Saint Francis College is a private college. See Pendrell v. Chatham College, 370 F. Supp. 494 (W.D.Pa. 1974); Brownley v. Gettysburg College, 338 F. Supp. 725 (M.D.Pa. 1972). It is neither state owned nor state related. See Benner v. Oswald, 592 F.2d 174 (3d Cir. 1979) (Penn State); Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977). The affidavit of Richard Crawford, Assistant to the President, attached to the Motion for Summary

Judgment states that no action(s) taken by Saint Francis College relative to plaintiff was taken under the color of state law, that Saint Francis College is a private college, and that it is neither state owned nor state related. Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764 (1982), held, inter alia, that receipt of public funds does not make an employment decision of a school a decision of the state. Therefore, no facts are stated in the record warranting a possible conclusion that the alleged acts here could be considered to be under color of state law. Accordingly, the § 1983 claim must be dismissed, a result plaintiff concedes in his brief relative to the motion here.

Since there is redress available in the state system for any action of defendants, there is no federal claim under 42 U.S.C. § 1983. See Cohen v.

City of Philadelphia, 736 F.2d 81 (3d Cir. 1984).

Furthermore, since the individual defendants are not the employer, they are not within any theory of liability in contract or under the Pennsylvania Human Relations Act or for intentional infliction of emotional distress. It should be noted that the function of the Tenure Committee, and its members in voting, under the Guidelines for Tenure, is to make recommendations, and the Committee and its members do not have decision-making capacity and authority. The Tenure Committee, and its members in voting, under the Guidelines for Tenure, are to render a qualitative judgment, which judgment here, as manifested in the vote of the Committee, was negative. The authority and power of the Board of Trustees, under the governing College documents, including the Guidelines for

Tenure, was exercised to deny and withhold tenure. Thus, the individual defendants lack capacity to be sued and authority to be sued in either an individual or a representative or an official capacity, inasmuch, as previously stated, their function in the tenure process is merely to make a recommendation and they do not have decision-making capacity and/or authority. Furthermore, the Tenure Committee is not a legal entity or an entity subject to suit, and lacks capacity to be sued and authority to be sued, since the function of the Tenure Committee in the tenure process, under the Guidelines for Tenure, is merely to make a recommendation and it does not have decision-making capacity and/or authority. In view of the limited, non-decision-making role of the individual defendants in the tenure process, they

are thus not subject to liability under any of the theories propounded by plaintiff.

Likewise, we are of the view that plaintiff's claims relative to intentional infliction of emotional distress and breach of contract are without merit or legal support.

Finally, once the federal claims under §§ 1981 and 1983 are dismissed, there are no federal claims left to which any state claims can be pendent and all are subject to dismissal.

An appropriate order will be filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,	)	
Plaintiff	)	
v.	)	Civil Action No. 80-1550
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, Individually and in their official capacities,	)	
Defendants	)	

O R D E R

AND NOW, this 12th day of March, 1985, upon consideration of Defendants' Motion for Summary Judgment and briefs relevant thereto, and being of the view that there exist no genuine issues of material fact,

IT IS ORDERED that:

(1) Defendants' Motion for Summary Judgment is GRANTED;

(2) Judgment is entered in favor of the Defendants, Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, and against the Plaintiff, Majid Ghaidan Al-Khazraji, also known as Majid Al-Khazraji Allan.

s/ Glenn E. Mencer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,	)	
Plaintiff	)	
v.	)	Civil Action No. 80-1550
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, Individually and in their official capacities,	)	
Defendants	)	

O P I N I O N

Ziegler, District Judge

I. History of Case

Majid Ghaidan Al-Khazraji, Ph.D., was employed for nearly six years as an associate professor in the Department of Behavioral Science at Saint Francis College, at Loretto, Pennsylvania. Al-

Khazraji is a United States citizen of Iraqui national origin, and a member of the Muslim faith. He received two advanced degrees in this country: a masters degree from Cornell University and a doctorate from the University of Wisconsin.

On February 10, 1978, the tenure committee of Saint Francis College completed its deliberations and voted to deny tenure to plaintiff. The Board of Trustees ratified the recommendation on February 23, 1978. Plaintiff appealed this decision within the institution, but the tenure committee voted against reconsideration of plaintiff's application.

On March 20, 1978, Al-Khazraji received a one-year written contract from the college for the 1978-79 academic year. This contract specifically stated that plaintiff's appointment as a full-

time faculty member would not be renewed at the conclusion of that academic year. Plaintiff completed the contract, and was officially severed from the faculty on March 20, 1979.

In October of 1980, plaintiff filed a pro se complaint against St. Francis College and the individual trustees. He initially alleged that defendants had engaged in employment discrimination in violation of Title VII of the Civil Rights Act of 1964.[1] Subsequently, plaintiff secured counsel and filed amended complaints which additionally alleged violations of 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, as well as violations of the Pennsylvania Human Relations Act, 43 P.S. § 951 et seq. The thrust of all these claims is that defendants denied tenure to plaintiff due

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[1] 42 U.S.C. § 2000(e) et seq, as amended.

to his national origin (Iraqui), religion (Muslim) or race (Arabian), in violation of federal law and the United States Constitution.

Defendants responded with a bevy of motions aimed at dismissing and striking the various claims brought by plaintiff.[2] By order dated February 9, 1981, this court dismissed plaintiff's claim under 42 U.S.C. § 1986 as untimely, but denied the remaining motions.[3]

Defendants now urge this court to reconsider its order of January 9, 1981, and dismiss the claims founded on Title VII, 42 U.S.C. §§ 1981, 1983, 1985(3) and the Pennsylvania Human Relations Act.

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[2]No brief accompanied defendants' original motions.

[3]This court also dismissed the allegations predicated on Title VII in plaintiff's second and third complaints as untimely. However, we left intact plaintiff's Title VII claim as it appears in his original complaint.

The issues now have been fully briefed by the parties and, for the following reasons, the motion of defendants to reconsider will be granted in part and denied in part.

II. Title VII Claims

Defendants first urge that plaintiff's claims under Title VII of the Civil Rights Act of 1964 should be dismissed in their entirety, as being untimely. Defendants take the position that any alleged discrimination occurred on February 10, 1978, when the tenure committee recommended that tenure be denied. Defendants argue that plaintiff had 180 days from that date to file a complaint with the EEOC, which he failed to do. Plaintiff rejoins, however, that the 180-day limitation period embodied in Title VII commenced on March 20, 1979, when he exausted his internal appeals and was officially discharged. For the

following reasons, we are compelled to conclude that plaintiff's Title VII claim is untimely.

Title VII of the Civil Rights Act of 1964 requires that aggrieved persons file a complaint with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred . . ." 42 U.S.C. § 2000 e-5(e). This limitation period, while guarantying the protection of the civil rights laws to those who promptly assert their rights, also protects employers from the burden of defending claims arising from employment decisions that are dated. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-464 (1975).

In a case strikingly similar to the one at bench, the Supreme Court recently held that the limitation period commences--for a college professor who believes that he has been discharged in

violation of Title VII--at the time the adverse tenure decision is made and communicated to him. Delaware State College v. Ricks, _____ U.S. _____ (1980). There the Board of Trustees of Delaware State College formally voted to deny Professor Ricks tenure on March 13, 1974. Ricks was offered a "terminal" contract to teach one additional year, after which time his employment relationship would end. Ricks executed the contract, and initiated grievance procedures within the college. On September 12, 1974, the Board notified Ricks that his grievance had been denied. On April 4, 1975, the plaintiff filed a complaint with the EEOC.

The Supreme Court held that the claim was untimely because Ricks had not filed the charge within 180 days of the date the college initially determined to deny him tenure, namely, March 13, 1974. The

Court rejected the contention that the statute of limitations began to run after the one-year "terminal" contract expired, or when the plaintiff exhausted the internal grievance procedures of the college. The Court concluded that "the only alleged discrimination occurred--and the filing limitations periods therefore commenced--at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure--the eventual loss of a teaching position--did not occur until later." _____ U.S. at _____.

Likewise, in the instant case, we are bound to conclude that the statute of limitations began to run, for purposes of filing the Title VII action, at the time St. Francis College made its official decision to deny tenure and communicated that decision to Al-Khazraji, namely, on

February 10, 1978.[4] This follows although plaintiff accepted a "terminal" contract for an additional year, and notwithstanding the institution of grievance procedures within the institution.

The Supreme Court's holding in Ricks compels the finding that, once the tenure committee voted to deny plaintiff tenure on February 10, 1978, the alleged discriminatory act was a fait accompli. Plaintiff then had 180 days to file a complaint with the EEOC.[5] Because he failed to comply with the statutory time period, plaintiff's claim under Title VII must be dismissed.

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[4]Or, at the very latest, on February 23, 1978, when the Board of Trustees ratified the decision of the tenure committee.

[5]Even if the 300-day period is applicable, plaintiff's suit is untimely.

III. Section 1985(3) Claims

We further find that Al-Khazraji has failed to state a claim under 42 U.S.C. § 1985(3). Plaintiff, in Count II of his second complaint, alleges that defendants conspired to violate rights secured by Title VII of the Civil Rights Act of 1964, as well as the Pennsylvania Human Relations Act.[6] He alleges that the conspiracy gives rise to a cause of action under 42 U.S.C. § 1985(3). We disagree.

The Supreme Court has specifically ruled that § 1985(3) creates no substantive rights by itself. Rather, it is a remedial statute, providing a civil cause of action when some otherwise defined federal right is breached by a conspiracy in the manner defined by that section. Great American Federal Savings

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[6] 43 P.S. § 951 et seq.

& Loan Association v. Novotny, 442 U.S. 366, 376 (1979). There the Court held that Title VII provides no basis for a 1985(3) action, because to allow such a detour would authorize an avoidance of most if not all of the detailed and spcific provisions of Title VII:

> [W]e conclude that § 1985(c) may not be invoked to redress violations of Title VII . . . Unimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(c).
>
> 442 U.S. at 378.

Al-Khazraji, having failed to meet the statutory filing requirements of Title VII, may not salvage his claim by submersion within the provisions of 42 U.S.C. § 1985(c). Nor may a state statute, such as the Pennsylvania Human Relations Act, serve as a predicate for a

cause of action under § 1985(3) since the latter was meant to provide redress for violations of federal rights. See Novotny, supra, 442 U.S. at 376. As a result, plaintiff has failed to state a cause of action under 42 U.S.C. § 1985(3), and that claim must be dismissed.

IV. Claims Under Sections 1981 and 1983

Defendants next contend that plaintiff's claims under 42 U.S.C. § 1981 and § 1983 are time-barred by the relevant statute of limitations. We disagree.

The Civil Rights Act of 1866, 42 U.S.C. § 1981 et seq., contains no specific statute of limitations. Federal courts, in adjudicating civil rights suits under the Act, are therefore bound to apply the period of limitations that governs the most nearly analogous state law claim. Johnson v. Railway Express

Agency, 421 U.S. 454 (1975); Liotta v. National Forge Co., 629 F.2d 903 (3d Cir. 1980).

Courts within the Third Circuit have, in countless cases, considered the question of the applicable statute of limitations in federal civil rights suits in which a plaintiff alleges racial discrimination in employment. At least to date, these courts have uniformly concluded that such actions are governed by the 6-year period of limitations set forth in 12 P.S. § 31.

The leading case is Davis v. United States Steel Supply, Inc., 581 F.2d 335 (3d Cir. 1978). There the plaintiff brought suit under 42 U.S.C. § 1981, alleging racially discriminatory employment practices. Specifically, Davis alleged harrassment by her fellow employees due to race, which ultimately led to her discharge when she persisted

in complaining to her supervisor.

The Court of Appeals considered with care the question of the applicable period of limitations under Pennsylvania law. The Court likened the claim to a cause of action for "an unlawful breach of an existing at-will employment contract," or to "those torts which involve the wrongful interference with another's economic rights or interests." 581 F.2d at 339. It therefore concluded that Ms. Davis' claim fit within the broad 6-year limitations period set forth in 12 P.S. § 31.[7] The Davis court specifically rejected the argument that the type of employment discrimination alleged was subject to the 2-year period

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[7]See also Skehan v. Bd. of Trustees of Bloomsburg State Col., 590 F.2d 470, 477 (3d Cir. 1978), where the court likened a professor's claim for discriminatory discharge to "the state law claim of wrongful interference with a contact," and applied the 6-year statute of limitations of 12 P.S. § 31.

of limitations posited in 12 P.S. § 34. That provision, said the court, was limited to actions in which damages were sought for bodily injury. 581 F.2d at 339.

In the instant case, Davis would be dispositive except for the change in Pennsylvania law. Effective June 27, 1978, the General Assembly repealed 12 P.S. § 31 et seq., and enacted a new and more complex statute of limitations. See 42 Pa.C.S.A. § 5521 et seq.[8] Defendant contends that Al-Khazraji's claim is no longer governed by the 6-year limitations period, but rather by one of the following provisions: the 1-year limitation contained in 42 Pa.C.S.A. § 5523, the 2-year limitation contained in 42 Pa.C.S.A. § 5524, or the 90-day limitation period embodied in the

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[8]Act of 1976, July 9, P.L. 586, No. 142, generally effective June 27, 1978.

Pennsylvania Human Relations Act, 43 P.S. § 959. If any of these enactments are apposite, plaintiff's actions under 42 U.S.C. §§ 1981 and 1983 are untimely, because plaintiff did not raise these claims until November 7, 1980, nearly three years after the cause of action allegedly arose.

We are not persuaded however, by defendants' argument. None of these provisions are even vaguely analogous to an allegation of racial discrimination in terminating an employment contract. The 1-year statute of limitations contained in 42 Pa.C.S.A. § 5523 applies to actions for libel, slander, invasion of privacy, and to certain actions on bonds. The 2-year period of limitations found in 42 Pa.C.S.A. § 5524 applies primarily to actions for injury to the person or property. They hardly provide an analogue to a claim for discriminatory

termination of a college professor's employment contract.[9]

The sole question that remains is whether the applicable statute of limitations is the 4-year period contained in 42 Pa.C.S.A. § 5525, or the 6-year period contained in 42 Pa.C.S.A. § 5526. Both provisions in some way relate to actions for breach of contract, and both are arguably analogous to the sort of action at bench.

42 Pa.C.S.A. § 5526, which contains a 4-year statute of limitations, applies to various contracts for sale, oral contracts, and contracts implied in law. As indicated in the Official Source Note to this section, it is patterned after the statute of limit ons contained in the Pennsylvania Uniform Commercial Code,

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[9]As for the Pennsylvania Human Relations Act, we find it to be wholly inapposite.

which provides for a 4-year period of limitations in contracts for sale. See 12A P.S. § 2-725. We fail to perceive any portion of § 5526 that may be anologized to an action for alleged racial discrimination in denying tenure to a college professor. We re-emphasize that such an action may be likened to an action for unlawful termination of a written employment contract or, alternatively, to an action for tortious interference with an employment contract. See Davis v. United States Steel Supply, Inc., supra, 581 F.2d at 339; Skehan v. Bd. of Trustees of Bloomsburg State Col., supra., 590 F.2d at 477. Section 5526 therefore deals with a narrow category of contracts which is inapplicable to the instant case.

On the other hand, 42 Pa.C.S.A. § 5527, which establishes a 6-year statute of limitations, is significantly

broader in scope. It applies to any "action upon a contract, obligation or liability founded upon a bond, note or other instrument in writing . . ." This provision would appear to encompass actions for unlawful termination of written contracts, which may be analogized to the case before us.[10]

Moreover, although the statute specifically mentions neither actions for unlawful termination of written employment contracts nor actions for tortious interference with employment contracts, it is crucial to note that § 5527 of the new Act contains a broad

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[10]As the Official Source Note to § 5527 indicates, this section is patterned in part after 12 P.S. § 31, which formerly provided a 6-year statute of limitations for breach of contract and tortious interference with contracts, and we note that in Pennsylvania the broad run of contract actions have fallen under a 6-year limitation period for over 250 years. See Act of March 27, 1713. (1 Sm.L. 76 § 1).

saving provision. It provides that the 6-year statute of limitations will govern any civil action "which is neither subject to another limitation specified in this sub-chapter nor excluded from the application of a period of limitation by § 5531 (relating to no limitation.)" 42 Pa.C.S.A. § 5527(6). Thus, even if an action for discriminatory termination of a written employment contract did not fall squarely within the language of § 5527(2), relating to written contracts, it would be governed by the saving clause of § 5527(6). In either case, the 6-year limitation period is applicable.[11]

Our conclusion that the 6-year

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[11] In a number of cases since the enactment of the new Pennsylvania statute, courts have continued to apply a 6-year limitation period in similar civil rights suits, albeit under the old statute. See Liotta v. National Forge Co., 629 F.2d 903, 906 (3d Cir. 1980); Skrock v. Caltabiano, 505 F.Supp. 916, 920 (E.D.Pa. 1981).

statute of limitations should continue to apply is fortified by our belief that continuity in such procedural matters is crucial. If individuals are to be guaranteed a realistic ability to pursue federal civil rights actions, the limitations period for such actions should not lightly be changed. Citizens who turn to the courts to vindicate their civil rights, it must be remembered, are rarely trained in the niceties of Pennsylvania jurisprudence. And it is unwise for federal courts to limit the period of limitations, under the Civil Rights Act, absent a clear and specific change in state law mandating the dimunition.[12] We are satisfied that no such change has occurred in Pennsylvania

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[12]This is not to dispute that, sometime in the future, Pennsylvania case-law could effectuate a clear and specific change in the relevant period of limitations.

law with respect to the claim before us today.

V. Miscellaneous Contentions

The remainder of the contentions raised by defendants are without merit, and require brief comment only. Defendants assert that Al-Khazraji's claim under 42 U.S.C. § 1983 should be dismissed because plaintiff has failed to demonstrate state action.

This issue is controlled by Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). The question is whether the Commonwealth of Pennsylvania, in the language of Mr. Justice Clark, "has so far insinuated itself into a position of interdependence" with St. Francis College that it must be recognized as a joint participant in the alleged discriminatory activity. Plaintiff has at least raised a factual issue in this regard, because he has alleged that St. Francis College

"has received financial aid from the United States of America and the Commonwealth of Pennsylvania." See plaintiff's second complaint filed Nov. 7, 1980, at p. 2. Although this broad allegation is hardly dispositive of the issue, federal courts have been reluctant to dismiss civil rights actions for want of state action unless the facts have been fully explored. As the Court of Appeals has stated:

> It would perhaps be possible for us to decide this last issue (relating to state action) on the present record but we think we should not do so. Very important constitutional questions are presented and the Supreme Court has repeatedly informed us that such difficult issues should not be decided except upon a full record and after adequate hearing.

Braden v. University of Pittsburgh, 477 F.2d 1, 4-5 (3d Cir. 1973); See also Weise v. Syracuse University, 522 F.2d

397 (3d Cir. 1975). We therefore conclude that it is premature to dispose of the state action issue at this juncture, until a complete record is established.

Next, defendants urge that plaintiff's claim under 42 U.S.C. § 1981 should be dismissed because it is based on national origin and not on racial grounds. A number of courts have admittedly held that discrimination based upon national origin or ancestry is not actionable under § 1981. See Saad v. International Secur. Services, Inc., 456 F.Supp. 33 (D.C.D.C. 1978) (alleged discrimination on account of Arabian national origin not actionable under § 1981). However, as one scholar has noted:

> 'Section 1981 was enacted to eradicate disparate treatment between the white majority and clearly identifiable minorties,'

> and there are many cases holding that victims of discrimination based upon national origin or ancestry can use § 1981 to vindicate the rights set forth in the Act.

ANTIEAU, FEDERAL CIVIL RIGHTS ACT, § 23 (1980), quoting Ridgeway v. International Brotherhood of Electrical Workers, 446 F.Supp. 595, 597 (N.D. Ill. 1979).

Moreover, we observe that the distinction between "race" and "national origin" is an elusive one, and frequently turns on semantics rather than significant differences. Although the exact word "race" may not appear in plaintiff's third complaint, which raised the claim under 42 U.S.C. § 1981, plaintiff's position from the outset has been that he was subject to disparate treatment because of "national origin, religion, and/or race."[13] We therefore

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[13] See plaintiff's original complaint at page 1 and second complaint at page 3.

decline to dismiss plaintiff's action under § 1981 simply because he omitted the word "race" in his third complaint. In our view, it is a technical defect of little significance. The thrust of plaintiff's claim, namely, that he was denied tenure by St. Francis College because he is an Arabian born in Iraq, is clear to all concerned, and may serve as the basis for a civil rights action under 42 U.S.C. § 1981.

As a final matter, defendants point to the fact that three different complaints have been filed on behalf of plaintiff in this action. The original complaint was filed pro se by plaintiff on October 30, 1980. The so-called first amended complaint was filed by plaintiff's attorney on November 7, 1980. The so-called second amendment was filed pro se by plaintiff on December 22, 1980. Defendants assert that because the

second amendment--which solely raised Title VII claims--was dismissed by the court as untimely, the preceding complaints should be dismissed or stricken.

We decline to adopt this harsh approach. First, we note that the second amendment was filed pro se by plaintiff and it would be unjust to allow this amendment, which was obviously designed as a mere addendum to the original complaint, to supersede and nullify the complaints that preceded it.

Secondly, we note that there is some uncertainty as to which amendment in fact came last. Although plaintiff's amendment was filed after that of his lawyer, plaintiff's amendment was mailed, and the cover letter is dated November 5, 1980. Thus it appears that plaintiff actually prepared and mailed his pro se amendment before his attorney filed the

so-called first amended complaint.

In view of these facts, we will treat the first amended complaint, prepared by plaintiff's counsel and filed November 7, 1980, as the operative amendment in the instant action.

An appropriate order will follow.

DATED: September 30,1981

s/ Donald E. Ziegler
Donald E. Ziegler
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,	)	
Plaintiff	)	
v.	)	Civil Action No. 80-1550
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANOCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, Individually and in their official capacities,	)	
Defendants	)	

ORDER OF COURT

AND NOW, this 1st day of October, 1981,

IT IS ORDERED that the claims of plaintiff predicated on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., be and hereby are dismissed for want of timeliness.

IT IS FURTHER ORDERED that the claims of plaintiff predicated on 42 U.S.C. § 1985(3) be and hereby are dismissed for failure to state a cause of action.

IT IS FURTHER ORDERED that the motions of defendants to dismiss the claims of plaintiff predicated on 42 U.S.C. §§ 1981 and 1983 shall and hereby are denied.

IT IS FURTHER ORDERED that defendants shall file an answer to the claims of plaintiff within 20 days.

s/ Donald E. Ziegler
Donald E. Ziegler
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,	)	
Plaintiff	)	
v.	)	Civil Action No. 80-1550
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, Individually and in their official capacities,	)	
Defendants	)	

O R D E R

AND NOW, this 30th day of August, 1982, after careful consideration of submitted briefs, the plaintiff's Motion to Compel Discovery, filed July 2, 1982, is granted in part and

IT IS HEREBY ORDERED that the defendant, St. Francis College, produce

for the purposes of inspection and copying by plaintiff and his counsel all documents referencing plaintiff's involvement with or performance in the 'Tripoli project', and to answer Interrogatory No. 25 of the plaintiff's Interrogatories filed of record on April 14, 1982, and all other aspects of plaintiff's Motion to Compel Discovery is denied.

IT IS FURTHER ORDERED that Discovery is extended until October 1, 1982, and that plaintiff's Pretrial Narrative Statement shall be filed by October 21, 1982 and defendant's Pretrial Narrative Statement shall be filed by November 10, 1982.

s/ Glenn E. Mencer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3205

MAJID GHAIDAN AL-KHAZRAJI,
a/k/a MAJID AL-KHAZRAJI ALLAN,

Appellant

vs.

SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRAIN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities

(D.C. Civil No. 80-1550)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, GIBBONS, and STAPLETON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel December 5, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 12, 1985, be, and the same is hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees.

ATTEST:

s/ Sally Mrvos
Clerk

March 3, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3205

MAJID GHAIDAN AL-KHAZRAJI,
a/k/a MAJID AL-KHAZRAJI ALLAN,

Appellant

vs.

SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities

---

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, Circuit Judges

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

By the Court,

s/
Circuit Judge

DATED: APR 4, 1986

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

(D)

No. 85-2169

SUPREME COURT OF THE UNITED STATES
IN THE UNITED STATES COURT OF APPEALS

OCTOBER TERM, 1985

ST. FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH, and DAVID McMAHON, individually and in their official capacities.

Petitioners

vs.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent

Brief in Opposition to Petition for a Writ of Certiorari To the United States Court of Appeals for the Third Circuit

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August, 1986

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Attorney for Respondent
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3 pp

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Is an Arab, Middle Eastern Caucasian who has darker skin color than typical white Caucasians protected against discrimination under 42 U.S.C. 1981?

2. If Plaintiff has justifiably relied on clear past precedent, the rule of Wilson vs. Garcia will not apply retroactively to shorten the 1981 Statute of Limitations.

3. If individual members of a college tenure committee discriminate against Plaintiff because of his dark skin color and Iraqi national origin, can they not be held individually liable for discrimination?

4. Are college tenure committee members permitted to discriminatorily deny tenure, and then refuse to disclose their rationale for so doing as "confidential and privileged from discovery" in a subsequent employment discrimination in Federal Court?

5. If a white European Caucasian is appointed to a job which a darker Mid-East Caucasian had sought, does this fact operate as an absolute defense against a charge of employment discrimination since the Middle East Caucasian Plaintiff is unable to prove that he was replaced by a non-Caucasian?

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Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986)..... 15

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COUNTER STATEMENT OF THE CASE:

Plaintiff Dr. Majid Al Khazraji Allan, is a Ph.D sociologist born in Iraq, of Arab ancestry, who practices the Muslim religion (7a). Although he, as an Arab, is of the "Caucasian" race, he is of a different branch of the race and has a darker skin color than those of the white race customarily referred to as Caucasian. (204a). For six years, he served on the faculty of St. Francis College under written annual employment contracts (12a) and was qualified for tenure according to College guidelines. (17a - 18a). He applied for, and was denied recommendation for tenure by the Tenure Committee of St. Francis College on February 10, 1978, (15a), but was never told why he was denied tenure, or given any reasons for this decision. (16a)

Plaintiff received a terminal contract of employment under which his last day of work was May 20, 1979. (205a). (207a). Plaintiff contacted the Pennsylvania Human Relations Commission (hereinafter, "PaHRC") by telephone on September 14, 18 and 25, 1978.(206a) He submitted a letter and written documents in support of his claim of discrimination October 5, 1978.[1] (202a,206a). He was advised telephonically by Commission representatives on 17 occasions that as he would be employed through May 25, 1979 at St. Francis College, the PaHRC could not and would not accept his charge of discrimination "until he had worked his last day." (App. 203, 207).

Following PHRC's advice, Plaintiff filed his charge and the Commission docketed it, on June 22, 1979, (222a)

within 26 days of May 26, 1979, his last day of work. This charge was dual filed with EEOC this same date (App. 44a).

On May 10, 1979 Plaintiff secured a lawyer, (207a) who filed a breach of contract suit in State court. (185a.)

The PHRC dismissed his complaint May 25, 1980 for lack of subject matter jurisdiction due to untimely filing (under Ricks vs. Delaware State Teachers College, even though PHRC itself had refused to process the complaint based on its own erroneous reading of Ricks) and because Plaintiff had filed a State Court breach of contract suit on the same grievance.

Plaintiff filed suit in federal district court alleging violation of his civil rights on October 30, 1980, pro se, within the 90 day limit set forth in the right to sue letter. (226a).

On March 12, 1985, the federal district court granted summary judgment on the remaining federal claims under 42 U.S.C 1981&83, and dismissed the pendent claims. (app. 229a). Plaintiff appealed from the dismissal of the 1981 claim, and from the interlocutory orders, now appealable, denying discovery and dismissing title VII claims.

REASONS FOR NOT GRANTING THE WRIT

I. The decision of the Third Circuit applying 42 U.S.C. Section 1981 to an Iraqi Arab, who is of darker skin color than European white Caucasians is a decision clearly within the scope of Section 1981. There is no conflict with decisions of any other circuit.....

Plaintiff, an Arab of darker skin color than those customarily referred to as white, alleges denial of tenure in a discriminatory manner as compared to whites who received tenure. The district court considered only the allegations of the 1st Amended Complaint in its opinion granting the Motion for Summary Judgment. The court notes that Section 1981 applies to "racial and alienage discrimination", and Plaintiff's amended Complaint I only alleges national origin and religion. However, the Plaintiff's 1st complaint pro se

alleges, at Paragraph 7, "...said unlawful employment policy and practice consisted of refusing to renew the full-time faculty appointment of Plaintiff because of national origin, religion and or race..." The second amended complaint (pro se), at Paragraph 7, also alleges ..."depriving him of his Civil Rights....because of his national origin (Iraq), religion (Muslim) and/or race (Arabian).

Plaintiff's Complaints herein filed, his affidavit in opposition to Summary Judgment, and his deposition testimony all set forth his belief that he was discriminated against because of his national origin/religion/race: He was an Arab, a Caucasian of darker skin color than those Caucasians customarily referred to as white. Under section

1981, the issue is whether he was accorded treatment "...different from white citizens...".as the specific language provides, "All citizens of the United States shall have the same right to make and enforce contracts,...as is enjoyed by white citizens... The Civil Rights Act of 1866, 42 U.S.C. 1981.

The EEOC Government Wide Standards on Race and Ethnic Calegories recognize 4 "branches" of the Caucasian (white) race: Hispanic, European, North African and Middle Eastern.(42 F.R. 17,900 <1977>) As one authority has stated:

> "Individuals who have physical characteristics (particularly, color) that distinguish them from "whites" can pursue claims or racial discrimination under Section 1981, although they might technically be Caucasian in an

> anthropological or sociological sense..Mexican Americans and other Hispanics may thus state a cuase of action under 1981 for racial discrimination. The same rationale would apply with at least as much force to Orientals, native Americans, Indians and other arguably nonwhite groups.
>
> B. SCHLEI & P. GROSSMAN, Employment Discrimination 677, (2nd Ed. 1980)

Courts have had difficulty determining whether a claim of discrimination by certain minorities are ones covered by section 1981. It seems that if a Plaintiff alleges that he is of a different color, although defining himself as of the Caucasian race, that he will be allowed to proceed under 1981. If a plaintiff does not allege race, but only national origin, 1981 will be held not to apply, even though a national origin of Arab, Hispanic, North African, or Middle Eastern most likely

implies a darker skin color than white. Thus, the ability to enforce one's il rights under 1981 turns on a requirement that one be anthropologically-precise in pleadings.

See Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W. D. PA. 1977), disallowing claim by a Slav for race discrimination; Manzanares v. Safeway Stores, 593 F.2d 968,971 (10th Cir. 1979), allowing claim by a Hispanic Caucasian Mexican-American; Petrone v. City of Reading, 541 F. Supp. 735 (E.D. Pa. 1982) ,denying 1981 protection to a white Italian.

Courts have generally allowed Section 1981 claims alleging discrimination against Mexicans or Puerto Ricans, despite objections that they are

actually Hispanic "Caucasians": Sabala v. Western Gillette, Inc., 516 F.2d 1251, (5th Cir. 1975), Sanchez v. Trans World Airlines, Inc., 499 F.2d 1107, (10th Cir. 1974). Gonzalez v. Stanford Applied Engineering, 597 F. 2d 1298 (9th Cir. 1979) (Mexican); Ortiz v. Bank of America, 547 F. Supp. 550 (N.D. Cal. 1983) (Puerto Rican).

If Hispanic caucasians, who are by EEOC definition members of the 'white' race, are covered under section 1981, then why is a Middle Eastern (Arab) Caucasian not entitled to the same protection? In this case, the district court relied on Ibrahim v. N.Y. Dept. of Health, 581 F. Supp. 228 (E.D. N.Y. 1984) for the proposition that an Arab Plaintiff had not stated a viable

1981 claim. The Ibrahim court did not rationalize its decision in light of the EEOC's characterization of the four subgroups of the Caucasian race, nor set forth with specificity whether the pleadings and affidavits in Ibrahim raised the factual issue of differential treatment because of Plaintiff's having a darker skin color than those customarily referred to as white , as Plaintiff here has done. Nor can it be learned from Ibrahim whether the court knew that Ibrahim was a dark-skinned Midlle Eastern Caucasian , or whether Plaintiff had merely alleged Arabic national origin. The teaching of Ibrahim must be rejected as differentiated on the facts, and as not representative of the careful analysis that a court must give before dismissing a 1981 claim.

Petitioner claims that the 3rd Circuit's hold in this case conflicts with a decision of the 4th circuit. Petitioner St. Francis relies upon Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (5th Cir. 1986) for the proposition that since members of the Jewish faith have no protection under 1981, neither should ethnic Arabs. Shaare Tefila differs materially in its facts: Plaintiffs there, members of the Jewish faith, suffered violence directed at them by a Neo-Nazi group. Plaintiffs sued under Section 1982, claiming that since the Neo-Nazis group subjectively perceived Jews as racially inferior, the group's "racially"-motivated desecration of Plaintiff's synagogue formed the bases for 1981 and 1982 suits.

The district court in Shaare Tefila dismissed Plaintiff's claims holding that desecration of a synagogue did not constitute race discrimination. Plaintiff did not allege a status as "different from the white race" or of "darker skin color" in Shaare Tefila.

The critical difference between Sharre Tefila and the instant case, is that Shaare Tefila white plaintiffs sought to maintain their action because they were treated differently "from those of the white race" by a white Neo-Nazi group who subjectively perceived all Jews to be of an inferior race. The decision of the Third Circuit as to the 1981 claim was proper.

II. The decision of the Third Circuit not to apply the rule of Wilson v. Garcia retroactively is in full accord with this Court's directive in Chevron v. Huson.....

The circuit decision below carefully considered each of the three factors set forth by this Court in Chevron Oil Co. V. Huson, 404 U.S. 97 (1971) in determining whether the facts of this case merited non-retroactive application of this court's rule in Wilson v. Garcia, 105 S.ct. 1938 (1985). The Wilson rule applies a two-year personal-injury statute of limitations to a 1983 claim rather than a six-year contract statute. Goodman v. Lukens Steel, 777 F.2d 113, 118 (3rd Cir. 1985), 42 P.S. 5524. The circuit found that it would be unfair to apply Wilson retroactively to bar Plain- tiff's 1981 claim because Plaintiff had reasonably relied on "crystal-clear" case law of

the Third Circuit, which unanimously held (prior to Goodman), that 1981 claims enjoyed a six-year statute. Al-Khazraji v. St. Francis College, 784 F.2d 505 at _____, (3rd Cir. 1986) citing Davis v. U. S. Steel Suppy, 581 F.2d 335 (3rd Cir. 1978):

Four circuit courts which have done a Chevron analysis have agreed with the Third Circuit that if it would be unfair to shorten a statute of limi- tations by retroactive application, Wilson, must be applied prospectively. Gibson v. U. S., 781 F.2d 1334 (C.A. 9th 1986), Jackson v. City of Bloomfield, 731 F.2d 652 (C.A. 10th 1984), Anton v. Lehpamer, No. 85-2565, (C.A. 7th 1986). Other circuits, after a Chevron analysis, have applied the rule retroactively. There is no conflict among the circuits; each has

analyzed the rules under Chevron to determine whether the rule of Wilson applies retroactively, as did the third Circuit in Smith v. City of Pittsburgh, 764 F.2d 188, 194-196 (C.A. 3rd. 1985). Gates v. Spinks, 771 F.2d 916 (C.A. 5th 1985) (cert. denied _____U.S. _____, 1986); Jones v. Preuit & Mauldin, 763 F.2d 1250 (C.LA. 11th 1985) cert denied _____U.S. _____ (1986); Mulligan v. Hazard, 777 F.2d 340, cert denied, 54 USLW 3808 (June 10, 1986).

There is no conflict in the Circuits. If Courts follow the teaching of Chevron V. Huson, the issue of retroactive application of Wilson is easily and fairly resolved.

III. The decisions of the Third Circuit that the individual defendants may be held personally liable is clearly within the scope of the liability imposed for intentional discrimination under Section 1981 and does not conflict with the teachings of Anderson v. Liberty Lobby

It is clear that if the individual members of the Tenure Committee violated Plaintiff's rights, they can be liable individually as well as in official capacities as agents for the employer college. Directors, officers, and employees of corporation may become personally liable when they intentionally cause an infringement of rights protected regardless of whether the corporation may also be held liable. Tillman v. Wheaton-Haven Recreation Association. 517 F.2d 1146 (4th Cir. 1975): Faraca v. Clements, 506 F.2d 956, 959 (5th Cir.) cert. denied 422 U.S. 1006 (1975).

The Circuit's decision reinstated the 1981 causes of action as against individual tenure committee members. It is simply not true that Tenure Committee members have only "limited, non-decision-making roles" in voting to grant tenure. Until Plaintiff receives discovery on the events of his tenure decision, it is premature to suggest that individual defendants be released from liability. The holding of the Circuit Court was correct in this case and was in accord with decisions of other Circuits so holding. It is also in accord with dicta of this court in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236-37 (Section 1982 suit permitted against corporation and its directors).

REASONS FOR NOT GRANTING THE WRIT

IV. The decision of the Third Circuit reversing the order denying discovery of "confidential" tenure materials was correct and in accord with decision of this Court and of other circuits.

The issue here is crystal clear: whether a college tenure committee is exempt from discovery in a Federal Court proceeding to determine e whether its vote was free of the taint of unlawful race discrimination.

Plaintiff's burden in a tenure denial case alleging discrimination is set forth in Kunda v. Muhlenberg College, 463 F.Supp. 294 (E.D.Pa 1978),aff'd 621 F.2d 532, 544 (3d Cir. 1980). The applicant must show (1) membership in a protected class, (2) sufficient professional skills to

qualify for tenure, (3) consideration for and denial of tenure, and (4) that the employer continued to seek other applicants for tenure after denying it to Plaintiff. Once the Plaintiff has made a prima facie case, the burden shifts to the employer to articulate a legitimate, non- discriminatory reason for its decision. The Plaintiff then has the opportunity to show that the employer's reason was pretextual. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, (1978). For a claim raised under 1981, Plaintiff must show that the discrimination was intentional, Washington v. Davis, 426 U.S. 229 (1976.)

Since a non-discriminatory reason for denying tenure is an essential element of the employer's defense,

evidence relating to that reason should be discoverable. Defendant College refused to supply reasons for denying tenure to Plaintiff. The trial court refused to compel discovery, and denied Plaintiff access to virtually every piece of information relating to the reasons for the negative tenure vote:

a. the nature of individual committee member's votes,

b. the reasons for each member's votes,

c. the information available to each member concerning the Plaintiff,

d. the nature of any 'negative' information in the possession of the tenure committee member prior to the vote,

e. whether the member had 'sought out' relevant information on the Plaintiff, as he was obligated to do,

f. how Plaintiff's credentials compared to those of successful tenure applicants,

g. in what particulars Plaintiff had failed to meet the Guidelines for Tenure, which were part of his contract of employment

(see the Motion to Compel Discovery at 143a, setting forth each of these issues in great detail.)

Tenure cases have turned on the issue of whether a Defendant has articulated a legitimate non-discriminatory reason for refusing to tenure an applicant:

1. whether the votes of the committee were unlawfully influenced by national origin or race, Banerjee v. Smith College Board of Trustees, 495 F.Supp. 1148 (1st. Cir. 1982);

2. whether the college lacked objective guidelines for the grant of tenure and whether Defendant's tenure denial was

the result of consideration of unlawful or suspect subjective criteria, Turgeon v. Howard University, 571 F.Supp 679, (D. D. Col. 1983)

3. whether a negative tenure decision was based upon a pretextual reason, and whether Defendant failed to fully and fairly consider the merits of Plaintiff's application for tenure, Kumar v. Board of Trustees of the University of Mass. 566 F.Supp.1299 (D.Mass 1983)

4. whether the standard for appointment of a minority Plaintiff were more stringent than those applied to members of the majority , Turgeon v. Howard University, supra,

5. whether the vote for tenure was adversely influenced by impermissible factors such as Plaintiff's political support of positions contrary to those espoused by his employer, Civitico v. University of New Hampshire, (D.C. N.H.1982, unreported, C80-232L, Aug 19, 1982)

6. whether significant procedural irregularities in tenure procedures had occurred in the processing of the Plaintiff's

application; Kunda v. Muhlenberg; supra, 463 F.Supp. at 310,

7. whether persons with similar qualifications to Plaintiff's were granted tenure, while Plaintiff was denied tenure, Kunda v. Muhlenberg, supra, 463 F.Supp. at 310.

The approach taken by the District Court in restricting discovery in this case virtually forecloses proof of discrimination in university tenure Only if Defendants set forth the reason for denial of tenure can Plaintiff meet his burden of proof that the "non-discriminatory" reasons advanced by Defendants are pretextual. This issue applies equally to Section 1981 and Title VII claims. Gray vs. Bd. Higher Ed. of City of N.Y., 692 F.2d 901, 905 (C.A. 2nd 1983.)

The Federal Rules emphasize liberal and full disclosure of relevant informa-

tion. FRCP 26(b_1)(1). Rule 26 allows discovery of any material not privileged. This Court has held:

> "In resolving the tensions between the opposed needs for confidentiality vs. disclosure, we are reminded that the discovery rules are to be accorded broad and liberal treatment, particularly where proof of intent is required." Herbert v. Lando, 441 U.S. 153, 170-75 (1979).

Here, Respondent cannot cite a privilege that protects the votes of the tenure committee from disclosure. Dinnan v. Blaubergs, 661 F.2d 426 (5th Cir. 1981).

How can Plaintiff Al Khazraji prove his prima facie case? He has been denied discovery as to each and every one of the seven factors that other courts have held relevant in proving discrimination in the tenure process. He does not know the reasons for denial

of tenure; he has been forbidden access to the data the Committee had in front of it negatively influencing its decision; he does not know whether his union activities were a factor in the negative vote; he cannot learn whether his credentials compared unfavorably to those of white Catholics who received tenure,or in what regards his application was found to be lacking. He cannot even learn the vote of the faculty member known to have made disparaging racial remarks against Arabs, or whether that faculty member's prejudice against Plaintiff's race and origin colored his vote. He cannot measure the College's conduct against its obligations under his contract of employment, and cannot know whether the procedures in the tenure vote also

constituted a breach of his contract of employment by the College's not 'seeking out' material favorable to his tenure.

Since Plaintiff has been denied virtually all discovery, it is not surprising that the district Court granted the Motion for Summary Judgment against Plaintiff. The Circuit Court properly found that the Trial Court abused its discretion in denying Plaintiff discovery as to the reasons for denial of tenure. Its decision is in accord with the policy of this Court as enunciated in Herbert and should not be disturbed.

CONCLUSION

There is no conflict betweeen the Circuits as to any of the Questions presented by Petitioner. There is no reason for plenary consideration of any question by the Supreme Court.

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(5)

Supreme Court, U.S.
FILED
DEC 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-2169

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SAINT FRANCIS COLLEGE, ET AL.,

Petitioners

v.

MAJID GHAIDAN AL-KHAZRAJI,
a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed
July 2, 1986
Certiorari Granted October 6, 1986

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The following opinions, decisions judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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DOCKET ENTRIES

Date	NR.	PROCEEDINGS
1980		
Oct. 30	1	Complaint filed.
Oct. 30	---	Summons issued.
Nov. 7	2	Amended complaint filed, adding defts and amending caption
Nov. 7	---	Summons issued (as to amended complaint)
Nov. 10	3	Amendment to complaint filed pro se, adding defts.
Nov. 10	---	Summons issued as to amended complaint filed pro se.
Dec. 22	4	Stip. by parties to extend time pursuant to Rule 511 to answer or motion by defts. extended for 30 days to 1/23/81.
Dec. 22	5	Summons returned served on Dr. Marian Kirsch, Dept. of Biology on 12/3/80; on St. Francis College on 12/3/80; on Kirk Weixel on 12/3/80; on Fr. Gervase Cain, Exec. V. P. on 12/3/80; on Fr. Christian Oravec, Pres. on 12/3/80; on John Coleman on 12/3/80; on John Willoughby, V. P. for Academic Affairs, St. Francis College served on 12/3/80; on Dr. John Coleman, Dept. of History on

DATE	NR.	PROCEEDINGS
		12/3/80; on Kirk Weixel, Dept of English served on 12/3/80; on Gervase Cain on 12/3/80; on Dr. John Willoughby on 12/3/80; on Dr. Rodrique Labrie, served on 12/3/80; Dr. Adrian Baylock served on 12/3/80; served on St. Francis College on 12/3/80; on Dr. Albert Zanguccki, served on 12/3/80; on Dr. David McMahon served on 12/3/80; on Adrian Baylock on 12/3/80; Albert Zanzuccki served on 12/3/80; on Rodrigue Labrie served on 12/3/80; on Marian Kirsch served on 12/3/80.
1981		
Jan. 23	6	Motion for more definite statement, motion to strike, motion to dismiss first 2 complaints (original one and amended complaintl), motion to dismiss action, and motion to postpone consideration of motion to dismiss action until decision rendered on motion for more definite statement, motion to strike and motion to dismiss 1st 2 complaintss (original one and amended complaintl) filed. by defts.
Feb. 9	7	Order entered denying defts' motion for more definite statement; futher ordered

DATE	NR.	PROCEEDINGS
		that motion of defts. to dismiss action brought under 42 USC 1986 be granted but denied as to 42 USC 1981, 1983, and 1985; further ordered that defts' motion to strike pltf's 1st 2 complaints and motion to dismiss pltf's 1st 2 complaints be denied (Ziegler, J.)
Feb. 13	8	Motion to extend time to file responsive pleading filed by defts. and order entered granting same; counsel for defts. to file motion for reconsideration by 2/17/81; time for defts. to file responsive pleadings extended to date of 10 days after receipt of notice of Court's decision on motion for reconsideration (Ziegler, J.)
Feb. 17	9	Motion for reconsideration filed by defts. with proposed order.
Feb. 23	10	Order entered directing brief be filed by 3/20/81 by defts. in support to motion for reconsideration; respondent's brief due 3/30/81 (Ziegler, J.)
Mar. 27	11	Entry of appearance filed by Caroline Mitchell on behalf of pltf.

EDITOR'S NOTE

PAGES 4 thru End WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

DATE	NR.	PROCEEDINGS
Mar. 27	12	Motion to extend time for reply filed by pltf. with proposed order.
Mar. 30	---	Order entered on motion filed 3/27/81 extending time for pltf. to file reply brief to defts. brief in support of motion for reconsideration to 4/20/81 (Ziegler, J.)
Oct. 1	13	Opinion filed and order entered directing claim of pltf. on Title VII dismissed for want of timeliness; further ordered that claims of pltf. on 42 U.S.C. 1985 (3) dismissed for failure to state cause of action; further ordered that motions of defts. to dismiss claims of pltf. predicated on 42 USC 1981 and 1983 denied; further ordered that defts. file answer to pltf's claims in 20 days (Ziegler, J.)
Nov. 4	14	ANSWER filed by defts.
Dec. 10	15	Order entered invoking Rule 511; further ordered that: discovery to be completed by 4/12/82; pltf's pretrial narrative statement due by 5/3/82; defts. pretrial narrative statement due by 5/24/82 (Ziegler, J.)

DATE	NR.	PROCEEDINGS
	1982	
Feb. 23	16	Notice of service of pltf's interrogs. on deft. St. Francis College on 2/7/82, postage prepaid.
Feb. 23	17	Notice of deposition to be taken of Gervase Cain 3/9/82 at 10:00 AM filed by pltf.
Mar. 4	18	Stip to extend time for 3 months for completion of discovery and for filing of pretrial statements filed by parties and order entered granting same (Ziegler, J.)
Mar. 8	19	Motion filed by deft. St. Francis College and order entered extending time to Answer or Object to Pltf's 1st Interrogs. to deft. St. Francis College to 4/14/82 (Ziegler, J.)
Mar. 8	20	Motion filed and order entered extending time for defts. to Respond to Motion for Production of Documents to 4/14/82 (Ziegler, J.)
Mar. 22	21	Motion (request) for production of documents filed by pltf. with proposed order.
Apr. 14	22	Response to motion for production of documents filed by deft St. Francis College.

DATE	NR.	PROCEEDINGS
Apr. 14	23	Objections of deft St. Francis College to certain of pltf's 1st interrogs. to deft St. Francis College.
Apr. 14	24	Interrogs to deft Saint Francis College with answers thereto. (nos 1 thru 74)
Apr. 22	25	Notice reassinging case to Hon Glenn E. Mencer; discovery to end 6/4/82 and pretrial statements due 6/4/82.
Apr. 28	26	Notice to counsel advising closing date for discovery and due date for pretrial statement to be 7/12/82 in accord with order of Ziegler, J. dated 3/4/82; case reassigned to Mencer, J.
May 17	27	Motion to extend time under FRCP 30(e) filed by deft with consent of pltf. and order entered extending time to submit changes in form or substance to deposition and reasons therefor and to sign deposition from 5/21/82 to 6/4/82 (Mencer, J.)
Jun. 14	28	Notice of deposition to be taken 6/24/82 at 1:30 P.M. of Majid-Ghaidan Al-Khazraji a/k/a Majid Al-Khazraji Allan and filed by defts.

DATE	NR.	PROCEEDINGS
Jul. 2	29	Motion to compel discovery filed by pltf. with proposed order.
Jul. 2	30	Certificate of conciliation conference regarding contested discovery (for motion to compel discovery) filed by parties.
Jul. 2	31	Notice scheduling Hearing on Discovery Matters for 7/15/82 at 3:00 P.M. before Mencer, J.
Jul. 19	32	Hearing on Discovery Matters held 7/15/82 before Mencer, J. Memo filed (Concluded C.A.V.) (Rep none) (Briefs due 8/1/82; motion to compel to be ruled on thereafter; discovery extension will be based on the ruling)
Aug. 30	33	Order entered granting pltf's motion to compel discovery filed 7/2/82 in part and deft St. Francis College directed to produce for purposes of inspection and copying by pltf. all documents ref. pltf's involvement in "Tripoli project" and directed to answer Interrog No. 25; all other aspects of pltf's motion to compel discovery denied; further ordered that discovery extended to 10/1/82 and pltf's pretrial narrative statement due

DATE	NR.	PROCEEDINGS
		10/21/82 and deft's pretrial narrative statement due 11/10/82 (Mencer, J.)
Sept 17	34	Motion for amendment of interlocutory order filed by pltf.
Sept 29	35	Order entered on motion filed 9/17/82 directing Order of Ct. dated 8/30/82 denying pltf's motion to compel deft St. Francis College to reveal secret tenure deliberations hereby amended to include following language: "Such Order involves controlling question of law as to which there is a substantial ground for diff of opinion and that immediate appeal from said order may materially advance ultimate termination of litigation" (Mencer, J.)
Sept 30	36	Motion for extension of time for discovery filed by pltf.
Sept 30	37	Notices of depositions to be taken of following persons 9/28/82 at 11:00 A.M. filed by pltf: David McMahon; John Willoughby; Adrian Baylock; Marian Kirsch; Albert Zanauucki; Rodrique Labrie; John Coleman; Kirk Weixel.

DATE	NR.	PROCEEDINGS
Oct. 6	38	Order entered extending discovery time to 1/3/83' pretrial statement of pltf due 1/24/83; defts' due 2/14/83 (Mencer, J.)
Oct. 6	39	Motion for protective under FRCP 26(c) filed by defts. Willoughby, Weixel, Coleman, Labrie, Zanzuccki, Baylock, Kirsch and McMahon with proposed order and certif.
Oct. 8	---	Order entered on motion filed 10/6/82 granting motion for protective order, 8 depositions are not to be had because issues presented in deps identical to those presented by questions propounded to Father Gervase Cain in dep 3/12/82 and in interrogs to St. Fran Col. (Mencer, J.)
Nov. 15	---	Certified copy of order of Judge Weis dated 11/12/82 received from U.S. Court of Appeals and filed remanding petition to district court for compliance with Rule 23 of court (Ct. of Appeals No. 82-8138)
Nov. 26	40	Acknowlegements of service by Petitionsers and respondents counsels of record filed.

DATE	NR.	PROCEEDINGS
Dec. 3	41	Order entered amending 8/30/82 order to include certain language as stated more fully in order (Mencer, J.)
Dec. 8	42	Deposition of Majid A. KHAZRAJI Allan filed.
Dec. 8	43	Deposition of Father Gervase Cain filed.
1984		
Sept 5	44	Order entered directing pltf. file p/t stmt by 10/4/84- deft. to file p/t stmt by 10/24/84; pretrial conf. set for 10/30/84 at 4:30 P.M. (Mencer, J.)
Oct. 4	45	Pltfs Pretrial Narr Statement filed with proposed order.
Oct. 12	w/45	Order entered GRANTING pltf. an additional 30 days to file amendments, corrections or supplements to this pretrial statement FURTHER pltf's motion for reconsideration of discovery order is DENIED. (Mencer, J.)
Oct. 31	46	PRETRIAL CONFERENCE held 10/30/84 before Judge Mencer filed. (Rep.J.Goodworth) Jury trial date: 1/7/85 at 9:30 a.m.

DATE	NR.	PROCEEDINGS
Nov. 13	47	Supplement to Pltf's pretrial narrative statement filed.
Nov. 28	48	Motion for summary judgment filed by defts. w/proposed order.
Nov. 29	49	Notice of briefing schedule re: deft's motion for summary judgment filed.
Dec. 10	50	Motion for continuance of trial filed by pltf. w/proposed order.
Dec. 19	w/50	Order entered directing trial be reschedule for 7/8/85 at 9:30 A.M. Mencer, J.)
Dec. 26	51	Motion for continuance filed by pltf. w/proposed order.
	1985	
Jan. 7	w/51	Order entered granting pltf. additional 14 days to file brief re: Motion for summary judgment; brief due 1/11/85 (Mencer, J.)
Jan. 15	52	Pltfs Affidavits in Opposition to Motion for Summary Judgment by pltf.
Mar. 12	53	Memorandum Opinion & ORDER filed directing Defts Motion for Summary Judgment is Granted; Judgment is entered in favor of the defts, Saint

DATE	NR.	PROCEEDINGS
		Francis College, John Willoughby-Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzucci, Adrian Baylock, Marian Kirsch and David McMahon, and against the plaintiff Majid Ghaidan Al Khazraji a/k/a Majid Al-Khazraji Allan (MENCER, J.)
Mar. 12	---	Pursuant to the above order filed judgment is hereby entered accordingly. Gilbert W. Conley, Clerk
Mar. 12	---	Notices mailed.
Apr. 8	54	NOTICE OF APPEAL filed appealing order of March 12, 1985 granting summary judgment; order of October 1, 1981 dismissing title VII Counts; Orders of October 12, 1984 denying discovery & denying pltfs motion for reconsideration of its discovery order filed by pltf. Fees paid.
Apr. 8	---	Certified copy of the docket entries and notice of appeal; court orders of October 1, 1981, October 12, 1984, and March 12, 1985 and information statement mailed to US Court of Appeals; copy to Judge Mencer and all counsel of record and John Goodworth Court Reporter.

DATE	NR.	PROCEEDINGS
Apr. 17	55	Letter received from US Ct of Appeals advising case has been docketed at 85-3205.
Apr. 17	56	TPO filed by pltf stating no transcript is needed for the appeal.
Apr. 23	w/56	Statement of issues filed by the pltf.
Apr. 23	---	Record complete for appeal purposes; case certified; 3 copies of docket entries; one certified mailed to US Ct of Appeals.
Apr. 29	---	Certified List in Lieu of Record received from US Court of Appeals as to appeal 85-3205.
Nov. 6	---	Documents 6 and 48 plus two briefs forwarded
Nov. 8	---	Green certified mail receipt returned as received 11/8/85 per Evelyn McElroy.
Nov. 14	---	Briefs in support of summary judgment forwarded.
1986		
Jan. 6	---	Documents #6 and 48 plus briefs returned from U S Court of Appeals. (Briefs returned to J. Mencer)

DATE	NR.	PROCEEDINGS
Mar. 11	---	Slip opinion received from US Ct of Appeals stating that this is an appeal from a summary judgment entered in favor of the defts. Appellant, Majid Ghaidan Al-Khazraji alleges that he a US Citizen was denied tenure at St Francis College on account of his race, religion, and national origin. On appeal appellants case is premised on Title VII 42 USC 1981 and pendent state law claims. We affirm the district court as to title VII claim and reverse as to section 1981 and pendent claims (STAPLETON, J.)
Mar. 24	---	Information sheet on post decision matters received from US Ct of Appeals stating a petition for rehearing on behalf of appellee was filed on 3/17/86
Apr. 7	---	Information sheet on post decision matters stating an order was filed on 4/3/86 denying the petition for rehearing.
Apr. 24	---	Information sheet on post decision matters received from US Ct of Appeals stating an order was filed on 4/22/86 staying the issuance of the mandate to

DATE	NR.	PROCEEDINGS
		5/10/86 pending the filing of a petition for writ of certiorari in the Supreme Court of the U.S. 4/22/86.
May 21	---	INfo sheet on post decision matters stating an order was filed on 5-19-86 further staying the issuance of the mandate to 7/2/86 pndg the filing of a petition for w/cert in the supreme court
Jul. 25	---	Information Sheet on Post Decision Matters rec'd from Ct of Appeals showing a pet for w/cert was filed on 6-2-86 in the Supreme Court at #85-2169
Nov. 17	---	Letter from Ct. of Appeals advising that writ of certiorari having been granted by Supreme Court, Clerk of District Court to forward record.

COMPLAINT
Filed October 30, 1980

U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID G. AL-KHAZRAJI, Ph.D.,

Plaintiff

vs.

SAINT FRANCIS COLLEGE,

Defendent

CIVIL ACTION COMPLAINT NO. 80 1550

JURISDICTION IN VENUE

1. Pursuant to 28 U.S.C. Section 1343(4).

This is an action authorized and instituted pursuant to Section 706(f)(1) (f)(3) (f)(g) of Title VII of the Civil Right Act of 1964, as amended, 42 U.S.C. Section 2000e et seq.

2. The unlawful employment practices alleged herein were and are now being committed with the Commonwealth of Pennsylvania and the Western Judicial District of Pennsylvania.

3. The Plaintiff is Majid G. Al-Khazraji, Ph.D., an adult U.S. citizen, who resides at 36-A Vairo Blvd., State College, Centre County, Pennsylvania. The Plaintiff is Muslim, Arabian, and Iraqi in national origin.

4. The Defendent is Saint Francis College, a private white Catholic college located at Loretto, Pennsylvania.

Since July 2, 1965, Defendent Saint Francis College, private college has continuously and is now doing business in the Commonwealth of Pennsylvania where it is engaged in the business of higher education. Annually, in the course and conduct of its business, the Defendent ships and receives substantial amounts of goods across state lines and has continuously and does now employes more than fifteen (15) employees.

5. Since at least July 2, 1965, Saint Francis College has continuously been and

is now an employer engaged in an industry affecting commerce within the meaning of Section 706(B), (G) AND (H) of Title VII, 42 U.S.C., Section 2000e-(B), (G) and (H).

STATEMENT OF COMPLAINT

6. More than thirty (30) days prior to the institution of this law suit, a person claiming to be aggrieved filed charges with the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) alleging violation of Title VII by Saint Francis College. All conditions precedent to the institution of this civil action have been fulfilled.

7. On or about February 10, 1978, Saint Francis College intentionally engaged in a discriminatory employment policy in practice based upon national origin, religion, and/or race at its Loretto, Pennsylvania location in violation of Section 703(A) of Title VII. Said

unlawful employment policy and practice consisted of refusing to renew the full-time faculty appointment of Majid G. Al-Khazraji, Ph.D. because of national origin, religion, and/or race.

8. The effect of the policy in practice herein complained of in paragraph (7) has been to deprive the employee herein involved of equal employment opportunity and otherwise adversely affect his status as an employee because of his national origin, religion, and/or race in violation of Title VII.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, Majid G. Al-Khazraji, Ph.D., respectfully prays that this Honorable Court will:

a.) grant a preliminary and permanent injunction enjoining Saint Francis College, its officers, agents, employees, successors, assigns, and all other

persons in active concert on participation with the College from engaging in any employment practice which discriminates because of national origin, religion, and/or race.

b.) order the College to make whole Majid G. Al-Khazraji, Ph.D. who is adversally affected by the unlawful employment policy in practice described above, by providing the requested tenured faculty position; back pay, with interest, in an amount to be proved at trial and other affirmative reliefs necessary to eradicate the irreparable effects of the College's past and present unlawful employment policy in practice.

c.) grant such further relief as the Court deems necessary and proper.

d.) award the Plaintiff his costs in this action.

RESPECTFULLY SUBMITTED,

s/
Majid G. Al-Khazraji, Ph.D.,

Plaintiff

36-A Vairo Blvd.
State College, PA 16801

Telephone: (814) 237-0078

AMENDED COMPLAINT
Filed November 7, 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN, Plaintiff	:	
v.	:	
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities, Defendants	:	CIVIL ACTION NO. 80-1550 JURY TRIAL DEMANDED

AMENDED COMPLAINT
P.D.K.

I. JURISDICTION AND VENUE:

1. This action for declaratory relief, back pay, compensatory damages, punitive damages, and the costs of suit, including reasonable attorneys' fees, is

brought by Plaintiff to redress violations of rights secured to him by the laws of the United States and the Commonwealth of Pennsylvania.

2. The action arises under 42 U.S.C. §1981, §1983, §1985(3) and §2000e-5, et seq. for injuries caused by Defendants' violation of rights as guaranteed in the First and Fourteenth Amendments to the Constitution of the United States and by federal law. Relief is sought pursuant to the aforementioned statutes and to 42 U.S.C.§1988 (as amended P.L. 94-599, October 19, 1976) and 28 U.S.C. §2201 (The Declaratory Judgment Act). The amount in controversy exceeds Ten Thousand ($10,000) Dollars, exclusive of interest and costs.

3. The complaint also sets forth a claim for breach of contract under the laws of the Commonwealth of Pennsylvania, as well as violation of the Pennsylvania

Human Relations Act (43 P.S. §951 et seq.) and intentional infliction of mental distress arising out of the facts forming the basis of the federal claims over which this Court has jurisdiction. This Court is requested to assume pendent jurisdiction over the aformentioned claims.

4. Jurisdiction is conferred upon this Court by 28 U.S.C. §1331 and §1343 and 42 U.S.C. §2000e-5.

5. The violations of Plaintiff's rights as alleged herein occurred in the Western District of Pennsylvania. Venue is properly laid in the Western District of Pennsylvania under 28 U.S.C. §1391(b) and 42 U.S.C. §2000e-5(f)(3).

II. PARTIES:

6. Plaintiff, Majid Ghaidan Al-Khazraji, now Majid Al-Khazraji Allan, is a male citizen of Iraqi national origin, who currently resides in Old Westbury,

New York, but at all times relevant hereto resided at R.D. Box 131-K, Loretto, Cambria County, Pennsylvania. He holds a Masters degree from Cornell University and a Ph.D. degree from the University of Wisconsin. He was employed as an Associate Professor in the Department of Behavioral Science at Saint Francis College from August 20, 1973 until May 26, 1979, when his teaching contract was terminated.

7. Defendant Saint Francis College (hereinafter "College") is an educational institution organized as a corporation under the laws of the Commonwealth of Pennsylvania, with principal administrative offices and places of instruction located at Loretto, Cambria County, Pennsylvania. As an institution of higher education, it has received financial aid from the United States of America and the Commonwealth of

Pennsylvania.

8. Defendants John Willoughby Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon were, at all times material hereto, members of the Tenure Committee of Saint Francis College. The aforementioned defendants (hereinafter collectively "Tenure Committee") are sued individually and in their official capacities as members of the Tenure Committee of Saint Francis College.

III. FACTS:

9. Plaintiff was hired as an Associate Professor of Sociology in the Department of Behavioral Science of Saint Francis College, effective August 20, 1973.

10. Although Plaintiff had six (6) years of previous teaching experience as an Assistant Professor in the Department

of Sociology at Holy Cross College, his initial employment contract with Defendant College excluded consideration of any such previous teaching experience toward tenure. The criteria for promotion and tenure, as set forth in Defendant College's Faculty Guidelines in effect when Plaintiff was hired in 1973, allow a maximum of three years teaching experience at other institutions of higher learning to be credited toward tenure, with a minimum of three years full time service at Saint Francis College.

11. As set forth in the Faculty Guidelines in effect when Plaintiff was hired in 1973, as well as when Plaintiff was considered for tenure in 1978, the criteria for promotion and tenure to be applied in evaluating an applicant for tenure were:

a. compatability with colleagues and students;

b. continued professional growth

c. memberships - academic and professional;

d. memberships - civic and other;

e. moral character;

f. scholarly publications;

g. sense of responsibility; and

h. teaching competence.

12. Plaintiff was not recommended for a promotion from Associate Professor to Professor prior to his application for tenure in 1978, although the minimum requirements for the rank of Professor as set forth in the Faculty Guidelines were a Doctor's degree and three years of full-time teaching experience as an Associate Professor, both of which requirements Plaintiff had fulfilled as of the end of the 1975-76 academic year.

13. After serving a probationary period, Plaintiff presented a formal

application for tenure on January 16, 1978, which included an extensive curriculum vitae, a list of off-campus professional or related experiences of significance, a list of professional and civic memberships, a list of scholarly professional publications, and a list of academic and instructional accomplishments while a faculty member at Saint Francis College.

14. Plaintiff's tenure application was assigned to Defendant Tenure Committee for consideration.

15. Plaintiff made a personal appearance before the Defendant Tenure Committee following the submission of his tenure application in order to provide the Committee with relevant information reflecting upon his qualifications for tenure and to answer questions and clarify any points raised by the individual members of the Tenure

Committee.

16. During the course of Plaintiff's personal appearance before the Defendant Tenure Committee, no questions were raised or directed to him regarding any deficiencies in his tenure application or in his qualifications for tenure, nor did any member of the Committee indicate that Plaintiff's supporting data was inadequate or inconclusive, either in quality or quantity.

17. At the conclusion of the deliberations by Defendant Tenure Committee on Plaintiff's tenure application, he was not requested to make an additional personal appearance to rebut any information gathered by the Committee in the course of its meetings or to respond to any particulars that would otherwise militate against tenure being granted.

18. Plaintiff conformed to and complied with all requirements established by Defendant College for faculty applications for tenure and as published in its Faculty Guidelines. Plaintiff also provided Defendant Tenure Committee with all information and documents requested by the Committee in reviewing Plaintiff's tenure application.

19. Neither Defendant Tenure Committee nor any of the individual Defendant members of the Committee ever informed Plaintiff that it did not have adequate information upon which to render a full, fair and impartial qualitative judgment as to Plaintiff's qualification for tenure.

20. On or about February 10, 1978 Defendant Tenure Committee concluded its deliberations on Plaintiff's application for tenure and voted to recommend that tenure not be granted. Subsequently, the

Board of Trustees of Saint Francis College accepted and ratified the recommendation of Defendant Tenure Committee not to grant tenure to Plaintiff.

21. Plaintiff was verbally informed by Defendant John Willoughby, Vice-President of Academic Affairs, that Plaintiff's tenure application had been denied; however, Defendant Willoughby did not specify or identify any reasons for the decision to deny tenure.

22. Plaintiff was not provided in advance with the reasons for the decision to deny his tenure application, nor was he provided an opportunity to present a response to such reasons.

23. Despite written requests by Plaintiff, the American Association of University Professors, and Plaintiff's legal counsel that Defendant College provide in writing the reasons for the

decision by Defendant Tenure Committee to deny Plaintiff's tenure application, Defendant College has steadfastly refused and failed to provide, either orally or in writing, the reason or reasons for not granting tenure to Plaintiff.

24. On or about March 20, 1978, Plaintiff received an annual contract from Defendant College for the 1978-79 academic year which stated that Plaintiff's appointment as a full-time faculty member at Saint Francis College would not be renewed at the conclusion of that academic year.

25. Plaintiff was not provided in advance with the reasons for the decision not to renew his faculty appointment, nor was he provided and opportunity to present a response to such reasons. In addition, despite requests therefor, Defendant College has steadfastly refused and failed to provide, either orally or

in writing, the reason or reasons for not renewing his faculty appointment.

26. Although Defendant College's guidelines for tenure do not establish an appeal procedure for a faculty member whose tenure application has been denied, Plaintiff initiated various efforts to secure a review and reappraisal of the decisions to deny his tenure application and terminate his faculty appointment within the existing internal structure of Saint Francis College.

27. On or about November 27, 1978, Plaintiff appeared before the Faculty Affairs Committee (FAC) of Defendant College for the purpose of presenting reasons for his appeal from the decision of Defendant Tenure Committee and his request that Defendant Tenure Committee reconvene to reconsider his case.

28. On or about January 31, 1979, the FAC presented a report to the Faculty

Senate of Saint Francis College in which the FAC recommended that Defendant Tenure Committee reconvene and decide whether to reconsider Plaintiff's tenure application. Subsequently, the Faculty Senate accepted the recommendation of the FAC and remanded the matter to Defendant Tenure Committee.

29. On or about February 19, 1979, Defendant Tenure Committee reconvened and voted not to reconsider Plaintiff's tenure application, but did not present any reasons for its decision. Despite requests therefor, Defendant Tenure Committee has steadfastly refused and failed to provide, either orally or in writing, the reason or reasons for not reconsidering Plaintiff's tenure application.

30. At the time Plaintiff submitted his tenure application and at the time of his application was denied by Defendant

Tenure Committee, Plaintiff had fulfilled and satisfied all of the tenure standards established by Defendant College, including, inter alia:

a. award of M.A. and Ph.D. degrees;

b. authorship or co-authorship of over 20 monographs and three articles;

c. membership in various professional and educational societies and organizations;

d. recepient of various academic and professional honors;

e. full-time teaching experience in institutions of higher learning from September 1967 through January 1978, a period of 10 1/2 years;

f. service on various college committees;

g. involvement in community activities;

h. involvement in student activities;

i. development of internship programs and research programs;

k. procurement of various grants, including a $23,000 grant from the Libyan government and over $50,000 in grants from the Southern Alleghenies Planning Commission for Research;

l. involvement with international research as Principal Researcher and Technical Advisor to the Arab Development Institute in Tripoli.

In addition, Plaintiff received a positive evaluation from his department chairman, David McMahon.

31. In the "Saint Francis College of Pennsylvania" publication of Spring 1976, the Plaintiff and his wife, also a member of the Department of Behavioral Sciences at Saint Francis College, were the focus of a feature article headlined "Sociology Students Led to Action, Achievement". In the Winter 1978 issue of the aforesaid publication, the following item appears: "In the behavioral science department Dr. Majid Al-Khazraji's leave of absence to help establish the Arab Development Institute in Libya during the 1977

calendar yeart was a prestigious addition to the department's continuing record of scholarly and community-development activities".

32. By letter dated March 13, 1978, the faculty of the Department of Behavioral Science, including Plaintiff's department chairman, David McMahon, a member of Defendant Tenure Committee, expressed its unanimous support for Plaintiff's appeal for reconsideration of the decision by Defendant Tenure Committee to deny his tenure application. The letter further states:

> "Dr. Al-Khazraji's contribution to the department and to the college has been exceptional. As a teacher he has inspired students to excel in social research. As a colleague, he sets an example for concern with intellectural development, as well as a spirit of sharing in the personal concerns of students and other members of the college community. In addition, he maintains a highly professional commitment.

> We recognize his outstanding contributions to the college's relations with the larger community, as well as to programs within the department, in particular in sociology and social work.
>
> We believe that he has met the qualifications for tenure, and beyond that, excels as a dedicated, energetic, highly competent member of the college community."

33. The Defendants acted improperly, in contravention of its published tenure guidelines, and without any basis in fact in denying Plaintiff's tenure application.

34. Plaintiff's tenure application was improperly denied despite his having provided Defendants with clear and convincing evidence of his fitness to perform the academic work which he had been appointed annually to perform.

35. On or about June 22, 1979, Plaintiff filed a charge of discrimination based on national origin and religion with the Pennsylvania Human Rights Commission, which Commission

simultaneously filed said charge with the Equal Employment Opportunity Commission.

36. On or about August 6, 1980, the United States Department of Justice issued a notice of right to sue to Plaintiff. A copy of said notice is attached hereto as Exhibit "A".

37. Plaintiff was discharged from employment with Defendant College effective May 26, 1979.

IV. CLAIMS FOR RELIEF:

COUNT I - 42 U.S.C. §2000e et seq.

38. Saint Francis College is named as the Defendant in this Count.

39. The averments of paragraphs 1-37, inclusive, of this complaint are incorporated herein by reference.

40. Saint Francis College is engaged in an industry affecting commerce and has more than 25 employees.

41. Defendant Saint Francis College has intentionally discriminated against

Plaintiff with regard to the terms and conditions and privileges of employment on the basis of his national origin and religion by denying him tenure and by refusing to renew Plaintiff's appointment as a full-time faculty member.

WHEREFORE, Plaintiff prays this Count to:

1. Assume jurisdiction over this matter;

2. Require that Plaintiff be reappointed as a full-time faculty member with tenure at Saint Francis College effective February 28, 1979

3. Award Plaintiff back pay, as well as retirement and other benefits to which he is entitled, in an amount to be determined by the Court and punitive damages in the amount of $500,000.00;

4. Award Plaintiff compensatory damages, the costs of suit, and

reasonable attorneys' fees; and

5. Award such other relief as the Court deems necessary and proper.

COUNT II - 42 U.S.C. §1985(3), §1986

42. All Defendants named in this action are Defendants in this Count.

43. The averments of paragraphs 1-41, inclusive, of this complaint are incorporated herein by reference.

44. Defendants, through their overt acts, acting jointly and severally, individually and in their official capacities have conspired to deprive Plaintiff, either directly or indirectly, of his rights, secured by 42 U.S.C. §2000e et seq., 29 U.S.C. §206(d), and 43 P.S. §951 et seq., to be free from discrimination on the basis of national origin and religion in the terms and conditions of his employment by denying him tenure and by refusing to renew

Plaintiff's apointment as a full-time faculty member at Saint Francis College. Said acts have violated 42 U.S.C. §1985(3).

45. Alternatively, Defendants knew of said conspiracy and had the power to prevent the commission of overt acts in furtherance of said conspiracy, but neglected or refused to prevent such acts, in violation of 42 U.S.C. §1986.

WHEREFORE, the Plaintiff prays this Court to:

1. Assume jurisdiction over this matter;

2. Enter judgment declaring that:

   a. Defendants, acting jointly, severally, individually and in their official capacities, have violated rights secured to Plaintiff by 42 U.S.C. § 1985(3) and § 2000e et seq., 29 U.S.C. § 206(d), and 43 P.S. § 951 et

seq., by conspiring to deprive Plaintiff of his right to be free from discrimination on the basis of national origin and religion in the terms and conditions of his employment; or,

b. Defendants, knowing of said conspiracy and having the power to prevent the commission of overt acts in furtherance of such conspiracy, neglected or refused to do so, in violation of 42 U.S.C. §1986;

3. Require that Plaintiff be reappointed as a full-time faculty member with tenure at Saint Francis College effective February 26, 1979;

4. Award Plaintiff back pay, as well as retirement and other benefits to which he is entitled, for the damages he has suffered in an amount to be determined and punitive damages in

the amount of $500,000.00;

5. Award Plaintiff compensatory damages, the costs of suit, and reasonable attorneys' fees; and

6. Award such further relief as the Court deems necessary and proper.

COUNT III - Pendent State Claims

46. All Defendants named in this action are Defendants in this Count.

47. The averments of paragraphs 1-45, inclusive, of this complaint are incorporated herein by reference.

48. The Charter, By-Laws and Faculty Guidelines, as well as the American Association of University Professors norms on academic freedom, constitute part of the employment contract between Plaintiff and Defendant College.

49. Notwithstanding the provisions of this contract, Defendant College, acting upon the recommendation of

Defendant Tenure Committee, unlawfully terminated Plaintiff's employment at Saint Francis College at the end of the 1978-79 academic year and denied him tenure.

50. Plaintiff has at all times faithfully and well performed his duties and functions as Associate Professor at Defendant College and has received increases in compensation while so employed.

51. Plaintiff has satisfied all of the requirements for the award of tenure as specified in his contract of employment with Defendant College.

52. Plaintiff filed a complaint with the Pennsylvania Human Relations Commission on or about June 22, 1980, but Defendant College refused to conciliate. Subsequently, the Human Relations Commission voted to close the case on the basis that it lacked jurisdiction over

the matter on procedural issues.

53. Defendants' actions are in violation of 43 P.S. §951 et seq., the Pennsylvania Human Relations Act.

54. The willful, malicious and intentional actions of the Defendants in denying Plaintiff tenure and refusing to renew his full-time teaching appointment have seriously injured and destroyed his professional reputation, making it impossible or extremely difficult for him to obtain suitable comparable full-time teaching employment. Prior to the unlawful conduct of Defendants in denying Plaintiff's tenure application and terminating his full-time teaching appointment, he had always held full-time employment as a teacher of sociology. Since the occurrence of these unlawful actions, and as a direct result thereof, Plaintiff has been unable to obtain full-time employment in his field commensurate

with his professional abilities and experience. Moreover, in finding employment, Plaintiff has found it necessary to relocate to New York state, while his wife and family remain on Loretto, Pennsylvania where his wife teaches at Saint Francis College, thereby disrupting the family unit.

This inability to obtain suitable employment, which is the direct and proximate result of the unlawful, malicious and intentional actions of the Defandants, has caused Plaintiff to suffer severe emotional distress and depression.

WHEREFORE, Plaintiff prays this Court to:

1. Assume jurisdiction over Plaintiff's pendent state claims;

2. Issue a judgment that Defendant College has breached its employment agreement with Plaintiff and violated

43 P.S. §951 et seq.,

3. Require that Plaintiff be reappointed as a full-time faculty member with tenure at Saint Francis College effective February 26, 1979.

4. Award Plaintiff back pay, as well as retirement and other benefits to which he is entitled, for the damages he has suffered in an amount to be determined and punitive damages in the amount of $500,000.00;

5. Award Plaintiff compensatory damages, the costs of suit, and reasonable attorneys' fees; and

6. Award such further relief as the Court deems necessary and proper.

SHUMAKER and WILLIAMS

By s/C. Kent Price
C. Kent Price
The Pennsylvania Center
P.O. Box 88
Harrisburg, PA 17108
Attorneys for Plaintiff

[Equal Employment Opportunity Commission Notice Of Right To Sue, dated August 6, 1980, was attached to the Amended Complaint of November 7, 1980]

AMENDED COMPLAINT
Filed November 10, 1980

UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF PENNSYLVANIA

MAJID G. AL-KHAZRAJI, Ph.D.

Plaintiff

vs.

SAINT FRANCIS COLLEGE AND THE FOLLOWING MEMBERS OF ITS ADMINISTRATION AND FACULTY:

a. Gervase Cain, Executive Vice President;

b. John Willoughby, Vice President for Academic Affairs;

c. John Coleman, Department of History;

d. Rodrigue Labrie, Department of English;

e. Kirk Weixel, Department of English;

f. Marian Kirsch, Department of Biology;

g. Albert Zanzuccki, Department of Business Administration;

h. Adrian Baylock, Department of Mathmatics.

Defendents

AMENDMENT TO CIVIL ACTION

COMPLAINT No. 80-1550

FILED AT THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION COMPLAINT No.: 80-1550

JURISDICTION IN VENUE

1. Pursuant to 28 U.S.C. Section 1343(4).

This is an action authorized and instituted pursuant to Section 706(f)(1) (f)(3) (f)(g) of Title VII of the Civil Right Act of 1964, as amended, 42 U.S.C. Section 2000e et seq.

2. The unlawful employment practices alleged herein were and are now committed with the Commonwealth of Pennsylvania and the Western Judicial District of Pennsylvania.

3. The Plaintiff is Majid G. Al-Khazraji, Ph.D., an adult United States

citizen, who resides at 36-A Vairo Boulevard, State College, Centre County, Pennsylvania. The Plaintiff is Muslim, Arabian, and Iraqi in national origin.

4. The Defendents are Saint Francis College, a private white Catholic college located at Loretto, Pennsylvania; and the above-mentioned members of its Administration and Faculty who reside at or nearby its location.

Since July 2, 1965, Defendents Saint Francis College, private college and the above-mentioned members of its Administration and Faculty have continuously and are now doing business in the Commonwealth of Pennsylvania where they are engaged in the business of higher education. Annually, in the course and conduct of their business as a corporation, the Defendents ship and receive substantial amounts of goods across state lines and have continuously

and do now employ more than fifteen (15) employees.

5. Since at least July 2, 1965, Saint Francis College and the above-mentioned personnel of its Corporation have continuously been and are now employers engaged in an industry affecting commerce within the meaning of Section 706(B), (G) and (H) of Title VII, 42 U.S.C., Section 2000e-(B), (G) and (H).

STATEMENT OF COMPLAINT

6. More than thiry (30) days prior to the institution of this law suit, a person claiming to be aggrieved filed charges with the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) alleging violation of Title VII by Saint Francis College and the above-mentioned members of its Administration and Faculty. All conditions precedent to the institution of this civil action have been fulfilled.

7. On or about February 10, 1978, Saint

Francis College and the above-mentioned members of its Administration and Faculty intentionally engaged in a discriminatory employment policy in practice based upon national origin, religion, and/or race at their Loretto, Pennsylvania location in violation of Section 703(A) of Title VII. Said unlawful employment policy and practice consisted of refusing to renew the full-time faculty appointment of the Plaintiff, Majid G. Al-Khazraji, Ph.D.; of depriving him of his civil rights and academic freedom; and of causing him severe personal, health, financial, and professional damages because of his national origin (Iraqi), religion (Muslim), and/or race (Arabian).

8. The effect of the policy in practice herein complained of in paragraph seven (7) above has been to deprive the employee herein involved of equal employment opportunity and otherwise

adverselly affect his status as an employee because of his national origin (Iraq), religion (Muslim) and/or race (Arabian), in violation of Title VII.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, Majid G. Al-Khazraji, Ph.D., respectfully prays that this Honorable Court will:

a.) grant a preliminary and permanent injunction enjoining Saint Francis College, its officers, agents, employees, successors, assigns, and all other persons in active concert or participation with the College; and the above-mentioned members of the College's Administration and Faculty from engaging in any employment practice which discriminates because of national origin, religion, and/or race.

b.) order Saint Francis College and the above-mentioned members of its Administration and Faculty to make whole Majid G. Al-Khazraji, Ph.D. who is adversely affected by the unlawful employment policy in practice described above, by providing the justifiably requested tenured faculty position; back pay, with interest, in an amount to be proved at trail and other affirmative reliefs necessary to eradicate the irreparable effects of the past and present unlawful employment policy in practice of the College and the above-mentioned members of its Administration and Faculty.

c.) grant such further relief as the Court deems necessary and proper.

d.) order an appropriate punitive action prescribed by the law against the College and the above-mentioned

members of its Administration and Faculty.

e. award the Plaintiff his costs in this action.

RESPECTFULLY SUBMITTED,

s/
MAJID G. AL-KHAZRAJI, Ph.D.,
Plaintiff

36-A Vairo Blvd.
State College, PA 16801

Telephone: (814) 237-0078

Pennsyivania Human Relations
Commission Complaint - Exhibit A
to Motion for More Definite Statement,
etc., of January 23, 1981 in U.S. Court
for Western District of Pennsylvania
[Caption omitted in printing]

COMPLAINT

MAJID AL-KHAZRAJI	:	Commonwealth of
	:	Pennsylvania
Complainant	:	Governor's Office
	:	Human Relations
V.	:	Commission
	:	
SAINT FRANCIS	:	COMPLAINT
COLLEGE	:	DOCKET NO. E-16158
	:	
Respondent	:	

1. The Complainant(s) herein (is)(are):

(Name) Majid Al-Khazraji
(Address) R.D. 2 Box 131-K
Loretto, Pennsylvania 15940

2. The Respondent(s) herein (is)(are):

(Name) Saint Francis College
(Address) Loretto, Pennsylvania 15940

3. The Complainant(s) allege(s) that beginning on and/or occuring on and/or beginning prior and continuing on or about to wit May 26, 1979, the Respondent(s) did harm me unjustly by failing to renew my contract.

A. I, the complainant further allege that:

1. I have been employed by the respondents since August 20, 1973, as an Associate Professor of Sociology

2. After serving a probationary period at respondents facility, I applied for tenure on or about January 16, 1978.

2a. At the time of my application for tenure I met respondents minimum qualifications for eligibility, that of six years of college teaching experience; of these a minimum of three years teaching at respondents facility.

3. My formal application for tenure included an extensive curriculum vitae and other items documenting and attesting to my qualifications for tenure.

4. I appeared in person before the tenure committee to provide them with relevant information regarding my qualifications and to answer questions and to clarify points raised by members of the committee.

4a. The Committee never informed me that they didn't have enough information upon which to make a decision.

5. On or about February 10, 1978, the tenure committee, voted to recommend that my application for tenure be denied.

6. On February 20, 1978, I was verbally informed by Dr. John Willoughby, Vice-President for Academic Affairs of the decision by the tenure committee to deny my application, but he did not

specify or identify any specific reasons for the decision.

7. On February 21, 1978, I met with the president of the college, Father Christian Oravec, T.O.R., to request that my denial of tenure be brought before the Board of Trustees.

7a. He agreed to bring the matter to their attention at their meeting that same week.

8. On February 23, 1978, the Board of Trustees, declined to reverse the action of the tenure committee.

9. On March 14, 1978, I addressed a joint appeal to Oravec, and to Father Edmund Carroll, Chairman of the Board of Trustees requesting an appeal to the tenure committees decision.

10. On or about March 20, 1978, I received my annual contract for the 1978-79, academic year.

10a. The contract stated that it was not renewable beyond May 26, 1979.

10b. I signed the contract, but stipulated that my signature should not be construed to imply my acceptance of the decision of the tenure committee, the administration or the trustees.

11. On or about April 10, 1978, I received letters from Oravec and Carroll, expressing their appreciation for my contributions to the college, but upholding the recommendation of the tenure committee.

12. On or about May 15, 1978, I addressed a second appeal to Oravec and Carroll, requesting reasons for my dismissal from the college.

13. On or September 26, 1978, I wrote to the Faculty Senate requesting an intramural review process.

14. On or about September 28, 1978, the Faculty Senate voted unanimously to permit review process and designated the Faculty Affairs Committee as the body to undertake that review.

15. On or about November 27, 1978, I appeared before the Faculty Affairs Committee, to present my reasons for my appeal to the decision of the Tenure Committee and I requested that the Committee reconvene to reconsider my case.

16. On or about January 31, 1979, the Faculty Affairs Committee presented a report to the Faculty Senate with the unanimous recommendation that my case merited reconsideration.

16a. The Faculty Senate then resolved that the 1978, Tenure Committee reconvene and decide whether to reconsider my tenure application.

17. On or about February 19, 1979, the Tenure Committee met, with the exclusion of my department chairman, and decided not to reconsider my tenure application.

B. Respondents have not given me any reason orally or in writing as to why my application for tenure has been denied.

C. I, the complainant further allege that the respondents have discriminated against me because of my national origin, Iraq, my ancestry Arabian, and my religious creed Muslim by denying to grant me tenure and not renewing my contract in that:

1. No other candidate with the support of his or her department has ever been rejected by the Tenure Committee.

1a. I had the support of my department.

2. My qualifications equal or exceed those of individuals recommended for tenure recently or in the past.

3. No faculty member of a non-Judeo-Christian background has ever been tenured.

4. No faculty member from a third world background has ever been tenured.

5. Respondents have refused to cite reasons verbally or in writing as to why I have been denied tenure.

4. The allegations in paragraph 3 hereof constitute(s) an unlawful discriminatory practice or unlawful practice and is in violation of:

Pennsylvania Human Relations Act (Act of October 27, 1955, P.L. 744, as amended). Section 5 Subsection(s) (a)

[Pre-printed paragraph 5 of the Complaint is not marked as being applicable.]

6. No other action based on the aforesaid allegations has been instituted by the Complainant in any Court of before any other Commission within the Commonwealth of Pennsylvania except as follows:

None.

This charge will be referred to EEOC for the purpose of dual filing.

7. The Complainant(s) pray that the Respondent(s) be required

(a) to make the Complainant(s) whole, including but not limited to compensatory and/or punitive awards such as back pay and "out of pocket expenses."

(b) to eliminate all unlawful discriminatory practice(s) and procedure(s).

(c) to remedy the discriminatory effect of past practice(s) and procedure(s).

(d) to take further affirmative action necessary and appropriate to remedy the violations complained of herein.

(e) such further relief as the Commission deems necessary and appropriate.

COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF CAMBRIA :

Majid Al-Khazraji, of full age, being duly sworn according to law deposes and says: that he is the Complainant herein; that he has read the foregoing complaint and knows the content thereof; that to the best of his knowlege,information and belief the facts alleged therein are true.

s/Majid Al-Khazraji
Signature of Complainant

(Jurat omitted in printing)

Pages 6-9 of deposition of plaintiff on July 21, 1982 in U.S. Court for Western District of Pennsylvania
[Caption omitted in printing]

Deposition of MAJID AL-KHAZRAJI ALLAN
EXAMINATION

By Mr. Fisfis:
[p. 6]

* * *

Q. Was one Adrian Baylock?

A. I don't recall.

Q. Was one Marian Kirsch?

A. I don't recall.

Q. Was one of them David McMahon?

A. I don't recall.

Q. Were any of the prople who made this remark an officer of the college?

A. Faculty.

Q. Faculty, not an officer?

A. Right.

Q. Are you also taking the position that you were denied tenure because of your race?

A. Yes.

Q. What is your race?

A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion.

Q. Let me ask you of what branch of the Caucasian race are you?

A. I am not an expert on that.

Q. You just said that you were of a different branch.

[p. 7]

A. You know, this is a specialty. It is highly complex.

Q. But you are a member of the Caucasian race?

A. I believe so.

Q. You are not a member of the black race?

A. No.

Q. Or the yellow race?

A. Again, really I cannot answer this because this is a technical matter and we have to have an expert.

Q. Do you know of any races other than white, black and yellow?

A. This, I cannot answer because it is a very highly specialized field. I am not in a position to do that.

Q. What other reasons did you say you feel you were discriminated against?

A. National origin and religion or a combination of the two.

Q. What is your national origin?

A. Arabian and Iraqie.

Q. Are both Arabian and Iraqie --

A. and Moslem.

Q. Are both Arabian and Iraqie national origin designations?

[p. 8]

A. Iraq is part of Arabia.

Q. You are treating Arabia as a place of national origin?

A. You may say so. This is what we call the Arbian peninsula.

Q. That is the geographical area?

A. That's right. This separates it from Iran, Pakistan and so forth. It makes the Arabian peninsula separate.

Q. Which countries would you include within the Arabian national origin area?

A. This is, shall we say -- again, I need an expert on that because sometimes it is part of North Africa. Sometimes we include in the Arabian peninsula Sumaria, Ethiopa, Sudan. Today they include 13 of them. But arbitrarily there is no distinction about Arabia proper.

Q. Could you name, if you would, as many of the countries that you classify as Arabia?

A. Iraq, Kuwqait, Abu Dhabi, Iman, Saudi Arabia, Yemem, Jordan, Syria. That's it.

Q. You also say you are a Moslem?

A. Yes.

[p. 9]

Q. When you were at Loretto were you also an Episcopalian?

A. My wife is.

Q. Were you also one?

A. No, I just go because we believe in each other. We go as one family unit. I don't believe in, shall we say, making a distinction because it is a mixed marriage. I welcome her religion the way she welcomed mine.

Q. Are you or do you belong to any Moslem Mosque in the United States?

A. No.

Q. Are you a formal member of any religious organizations in the United States?

A. No.

Q. Do you regularly attend services at a mosque?

A. No.

Q. Are you an active, practicing Moslem?

A. Yes, with the understanding of the requirements of the Islamic faith that prayers, acting in good manner with fellow man, our private motto, we pray at home, we give at home. We don't have to display our activities as Moslems. Therefore, I was actively engaged in enjoying my faith.

Exhibit E to Motion for
Summary Judgment in U.S. Court for
Western District of Pennsylvania
Filed November 28, 1984

MAJID G. AL-KHAZRAJI, Plaintiff	:	IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA
vs.	:	NO.
SAINT FRANCIS COLLEGE, Defendant	:	IN EQUITY

AMENDED COMPLAINT

AND NOW, comes the Plaintiff, Majid G. Al-Khazraji, by his attorneys, Shumaker and Williams, and files this Complaint in the captioned matter, alleging the following in support thereof:

1. The Plaintiff is Majid G. Al-Khazraji, and adult individual, who resides at R.D. Box 131-K, Loretto, Cambira County, Pennsylvania.

2. The Defendant is Saint Francis College, a private Catholic college located at Loretto, Cambria County, Pennsylvania.

3. Plaintiff has been employed by Defendant since August 20, 1973 as an Associate Professor of Sociology pursuant to a series of one-year contracts.

4. Each yearly contract between Plaintiff and Defendant has expressly stated that "Saint Francis College subscribes to the American Association of University Professors' norms on academic freedom", thereby making such norms on academic feeedom an integral part of the contractual relationship between Plaintiff and Defendant. Copies of the 1973-1974 and 1978-1979 contracts are attached hereto as Exhibits "A" and "B" respectively, incorporated herein by reference, and deemed an integral part hereof.

5. After serving a probationary period, Plaintiff applied to Defendant for tenure on or about January 1978.

6. Plaintiff's request for tenure was assigned to a Tenure

[Allegations 7-26 of the Amended Complaint were not part of the Exhibit.]

27. The tenure standards adopted by Defendant and in effect at the time that Plaintiff's tenure application submission was denied on or about February 10, 1978 are attached hereto as Exhibit "I", incorporated herein by reference, and deemed an integral part hereof.

28. At the time that Plaintiff submitted his tenure application to Defendant and at the time that Defendant's Tenure Committee denied Plaintiff's tenure application, Plaintiff fulfilled and satisfied each of the tenure standards established by Defendant.

29. Plaintiff believes, and therefore avers, that Defendant acted improperly, in contravention of its own

tenure guidelines, and without any basis in fact in denying his tenure application.

30. Plaintiff believes, and therefore avers, that his tenure applications was improperly denied despite his having provided Defendant with clear evidence of his fitness to perform the academic work which he had been appointed annually to perform.

31. Plaintiff believes, and therefore avers, that consideration of his ethnic (Arab) and religious (Muslim) background were involved and included in Defendant's decision to deny Plaintiff's tenure application and not to renew Plaintiff's faculty appointment.

32. By reason of Defendant's improper action in denying Plaintiff tenure and not renewing his faculty appointment after May 26, 1979, Plaintiff will suffer great and irreparable damage,

the amount of which cannot now be definitely ascertained, in respect to the following matters, inter alia:

[The remaining allegations of the Amended Complaint were not part of the Exhibit.]

GUIDELINES FOR TENURE

TENURE. Saint Francis College, recognizing the need for tenure as a safeguard to academic freedom, extends the security of tenure to all its full-time faculty appointed to the ranks of assistant professor, associate professor, and professor, who, after the satisfactory completion of a period of probation, have given clear evidence of their fitness for the academic work which they were appointed to perform.

Probationary Period. The probationary period for all full-time members is six years. This probationary period may include full-time service in all other institutions of higher learning up to a maximum of two years. This determination of previous service applicable to tenure must be agreed upon in writing at the time of the intial engagement of the faculty member. A minimum of four years of full-time service must be spent at Saint Francis College. This minimum of four years may not be waived even though it would extend beyond the normal six years the probationary period of a faculty member who has had more than two years of teaching experience at other institutions of higher learning. However, in extraordinary circumstances, the President of the College may

recommend tenure to the Board of Trustees at any time with the approval of the Committee on Tenure.

The tendering of a contract for the last probationary period does not indicate the granting of tenure, nor does it imply that tenure will be granted. However, the decision of the Board of Trustees concerning tenure will be communicated to the applicant at least twelve months prior to the expiration of the last probationary contract.

Apart from the merits of individual candidates, which shall have been previously evaluated by the Committee on Tenure, the Board of Trustees of the College will consider in the granting or the withholding of tenure both budgetary considerations and the number and age of tenured faculty members already in a department. For these reasons a decision to withhold tenure should not necessarily be taken to reflect a negative judgment of an individual's competence.

Principles governing tenure.

A. Membership on the faculty is no guarantee of tenure. The responsibility for demonstrating a high level of teaching effectiveness and professional growth and for compliance with the other criteria listed below lies with the individual faculty member.

B. Tenure normally implies the right of a faculty member to continuous reappointment until retirement.

C. Tenure eligibility extends to all faculty members -lay, clerical, and religious.

Committee on Tenure

1. Structure

A. Personnel

1. The Vice President for Academic Affairs, who shall serve as the chairman of the committee.

2. Six tenured faculty members elected under the auspices of the Faculty Senate.

3. The Executive Vice President of the College.

4. The chairman of the department of which the candidate for tenure is a member.

B. Elections and meetings

1. Elections will be held under the auspices of the Faculty Senate during the first week of December.

2. The committee will meet for deliberations after the official opening of the Spring Semester and will conclude their deliberations prior to the February meeting of the Board of Trustees.

II. Sources of committee information

A. The candidate's formal application on the approved application form, in addition to any other documentation, such as complete and recent student evaluations, which he deems relevant.

B. The chairman of the applicant's department, who shall submit written visitation reports, a written evaluation of the candidate, and a recommendation.

C. The Vice President for Academic Affairs, who may submit a written evaluation of the candidate and any other information which he deems relevant.

D. Personal knowledge of the members of the committee.

E. Applicant's personal appearance before the committee to present his application.

F. Statements of committee chairmen attesting to the applicant's activities on College and/or Senate committees, provided at the request of the candidate.

III. Functions of the committee

A. Validate the possession by the candidate of the service requirements for tenure.

B. Render a qualitative judgment on the candidate's qualification based on the considerations listed under IV below.

C. Recommend the candidate for either tenure or termination.

IV. Considerations for rendering a qualitative judgment

A. Teaching effectiveness and professional compatability with colleagues and students as determined from the following sources:

1. Evaluation by department chairman.

2. Evaluation by the Vice President for Academic Affairs.

3. Evaluation by students as indicated on official student evaluation forms.

4. Personal knowledge of members of the Committee on Tenure.

B. Continued professional growth

1. Amplification

a. Continuing academic progress toward the doctorate.

b. Participation in conventions, workshops, etc., or professional groups.

c. Evidence of candidate's awareness of contemporary developments in his academic field.

2. Sources of information

a. Department chairman.

b. Candidate.

C. Memberships - academic and professional. Information supplied by candidate.

D. Memberships - civic and other. Information supplied by candidate.

E. Moral character. In the absence of specific evidence to the contrary, it is assumed that the candidate does possess moral character.

F. Scholarly publications. To be appraised by department chairman.

G. Sense of responsibility

1. Amplification

a. Effective discharge of professional routines, e.g., regular fulfillment of teaching schedule, attendance at faculty and department meetings, compliance with directions.

b. Effective discharge of special assignments.

c. Innovations of professional programs.

d. Effective participation in committee.

e. Direction of student activities.

2. Sources of information. All general courses of committee information.

V. Internal procedures of the committee

A. A quorum shall consist of the full membership of the committee. The seventh and eighth ranked faculty members in the election will be first and second alternates to serve on the committee only when elected faculty members withdraw.

B. At its initial meeting the committee shall elect a recording secretary whose responsibility shall be to prepare two copies of the committee-approved minutes and recommendations. Both copies shall be permanently retained by the chairman of the committee.

C. At the initial meeting of the Tenure Committee each year, the chairman shall provide each member of the committee with an official copy of the tenure regulations and shall review them in detail with the membership. He shall inform the committee that all deliberations are to be held permanently confidential.

D. As each applicant for tenure is considered, the chairman shall direct the attention of the committee to an explicit consideration of each criterion for tenure as it applies to the candidate's application. There shall be no restriction on the discussion relative to the evaluation of the candidate's strengths and weaknesses. During this discussion,

questions should be formulated to be directed to the candidate's chairman.

E. Thereafter, the committee shall invite the chairman of the candidate's department to join the committee for further deliberation and for the balloting.

F. Committee voting shall be by secret ballot and shall be undertaken after each candidate has been considered. Ballots shall be collected by the chairman of the committee after each vote. The ballots will then be sealed and retained by the chairman, to be tabulated by the chairman and the senior member of the committee (in years of service at Saint Francis College). After all voting has been concluded, the chairman will then announce to the membership the outcome of the balloting, without disclosing the actual vote count.

G. No candidate receiving more than three (3) negative votes shall be recommended for tenure.

H. Upon the disposition of all the applications, the committee may, at its discretion, formulate summary recommendations with respect to the tenure procedures.

I. The committee shall submit its recommendations concerning applicants for tenure to the President of the College.

J. The President of the College shall notify each candidate of the

disposition of his application by the Board of Trustees. Should the Board of Trustees decide to act at variance with committee recommendations for a tenure application, the President shall inform the candidate in writing of this fact. The chairman of the Tenure Committee shall inform the committee members of the Board of Trustees' disposition of the committee recommendations.

K. Thirty (30) days after the candidate has been notified of the final disposition of his application, all committee ballots shall be destroyed by the chairman of the committee.

Termination of Tenure

I. Grounds. The President of the College with the concurrence of the Board of Trustees may dismiss a tenured faculty member on the grounds of incompetence; insufficient course offerings in his field; the discontinuance of a department; financial necessity on the part of the College; or on grounds of moral turpitude.

II. Procedures.

A. If tenure is to be terminated because of financial necessity on the part of the College, it is incumbent on the institution to show the existence of such necessity of dismissal. Should any faculty member's services be terminated because of financial necessity, lack of sufficient course offerings within a department, or the discontinuance

of a department, the faculty member shall receive one year's notice of termination of service, or, in lieu of such notice, an amount of money equal to his last year's contractual salary. However, before resorting to termination of service, the College will make every reasonable effort to retain the faculty member in some other area of employment consistent with the faculty member's qualifications.

B. If tenure is to be terminated on grounds of incompetence or moral turpitude, the College will abide by the procedures outlines for such situations in AAUP Policy Documents and Reports, 1973 edition.

III. Clerical and religious faculty. Tenure for a cleric or religious ceases upon termination of assignment of the cleric or religious by his appropriate ecclesiastical or religious superior.

Review of Guidelines for Tenure. These guidelines may be revised at any time, but a formal review should be made at least every three years.

Revised: September 1974

Plaintiff's Affidavits in
Opposition to Motion for
Summary Judgment in U.S. Court
for Western District of Pennsylvania
Filed January 15, 1985

Affidavit

I, Thelma Griffith-Johnson, swear that:

From May 7, 1975, through June 16, 1982, I was employed by the Commonwealth of Pennsylvania as the Regional Director of the Harrisburg Regional Office of the Pennsylvania Human Relations Commission (PHRC). As Director I was responsible for the day to day administration of programs in 39 counties of Pennsylvania, one of which is Cambria County, located in the Western part of the State, contiguous to Pittsburg.

During my tenure the Pennsylvania Human Relations Commission was a 706 agency contracted by the U.S. Equal Employment Opportunity Commission to intake, dual file and investigate charges indigenous to the 706 agency's area and which were alleged infractions of Titles VII, IX and X. Since there is no federal regional office in Harrisburg, the PHRC Harrisburg Regional Office filed its dual filed charge with the Pittsburg or Philadelphia Regional Office of EEOC, as was appropriate.

During 1978 and 1979 the intake divisions of the Pennsylvania Human Relations Commission were prohibited from docketing cases which charged termination as a result of wrongful doing until the

termination had taken place. Notification of impending termination at some future date was considered insufficient reason to docket the charge or to proceed with the investigation.

On June 22, 1978, Dr. Majid Al Kazaraji filed such a case against St. Francis College, Cresson, Pennsylvania with the Harrisburg Regional Office.

The first time I met Dr. Al Kazaraji was in late May 1980, when he came to my office for an exit interview. During that meeting I learned from him that he had been advised by St. Francis College to exhaust all of his options at the college before attempting to file with an outside agency.

I learned also that Dr. Al Kazaraji sought to file with the Pittsburg Regional Office of PHRC, the Education Department of PHRC and the Harrisburg Regional Office of the PHRC, several times before his last day of work - May 26, 1978.

I subsequently spoke to Alphonso Brodus, intake representative and to Arbedella Davis the investigator in this matter. Mr. Brodus verified and Ms. Davis supported that he had received telephone calls and material from Dr. Al Kazaraji which he could not process because the complainant was still gainfully employeed by the respondent. Case records show Dr. Al Kazaraji's charge was docketed by appointment on June 22, 1979 or 27 days after his final working day at St. Francis College. On the same day it was dual filed with the EEOC which is within 180 days of Dr. Al

Kazaraji's February 19, 1979 notice from St. Francis College that the matter of his tenure had not been resolved in his favor. On that basis EEOC issued a Right to Sue Letter to Majid A. Kazaraji on August 6, 1980.

The Pennsylvania Human Relations Commission's practice of refusing a complaint until the last day of work prevented Dr. Majid Al Kazaraji from filing his case with PHRC. Although Mr. Brodus received and accepted a charge and supporting data from Dr. Al Kazaraji well in advance of the June 22, 1978 filing date he could not docket the charge because of General Council Robert Merrin's instructions not to accept such cases until the complainant had in fact been terminated and had spent the last working day on the job.

(Jurat omitted in printing)

s/Thelma Griffith-Johnson
Thelma Griffith-Johnson

IN THE UNITED STATE DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MAJID-GHAIDAN AL-KHAZRAJI ALLAN,

Plaintiff,

vs. Civil Action No. 80-1550

SAINT FRANCIS COLLEGE,

Defendant.

PLAINTIFF'S AFFIDAVITS IN OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT

I. AFFIDAVIT OF

DR. MAJID AL-KHAZRAJI ALLAN

1. I am of Arab ancestry and Iraqi National origin, having been born in Baghdad, Iraq. I practice the Muslim religion. Although Arabs, Indians and certain other ancestries are "Caucasian", they are of a different "branch" of the Caucasian race than those whites commonly referred to as "Caucasian", and I, with others of Arab ancestry, have darker skin

color than those customarily referred to as Caucasian.

2. After learning of the negative vote of the Tenure Committee, I had a series of meetings with Christian Oravec, President of the Defendant College and David McMahon. At three of these meetings, I was advised not to "do anything" until Saint Francis College made a final decision on my petition for reconsideration of the denial of my tenure application. I pressed my appeal by letters to the president, Christian Oravec, and Board of Trustees. In March 1978 I had a meeting with Christian Oravec in which he advised me not to sign my terminal contract, while Father Oravec explored "other routes" to solve my problem regarding tenure, including my staying on the faculty under yearly appointments or a research position. In September 1978 I appealed to the Faculty

Senate, which voted unanimously to permit a review by the Faculty Affairs Committee. On January 31, 1971, the Faculty Affairs Committee presented a report to Faculty Senate unanimously recommending reconsideration of my case by the Tenure Committee. On February 6, 1979, the Tenure Committee rendered its final decision and denied reconsideration of my case. This was a "final decision" from which no internal appeal could be taken.

3. A history of my contacts with the Pennsylvania Human Relations Commission, as verified by the documents attached hereto as Exhibits 1 through 6, is as follows:

1978:	09/14	by phone
	09/18	by phone
	09/25	by phone
	10/05	by phone and signed letter to Alfonso Broaddus containing documents outlining charge of discrimination

1979: 02/15 (3 calls) phone
03/06
03/07
03/26
03/27
04/06 letter
04/13
05/14
05/15
05/16
05/25 (2 calls)
05/31

I have attached copies of phone records from Bell of Pennsylvania for the months of September, October 1978 and February, March, April and May 1979, showing seventeen calls placed by me to the PHRC regarding my charge of discrimination. I have also attached copies of my letter of October 5, 1978 which contained various documents submitted to PHRC in support of my charge of discrimination. (As such documents are privileged from disclosure under PHRC regulations when submitted by complainant, I am not enclosing them.)

4. On 5/10/79, I retained counsel to file a breach of contract case in Cambria County Court. I was not represented by counsel from February 20, 1978 through May 1979, and had no way of knowing that the PHRC's legal advice to me that a charge could not be filed until my last day of work (May 25, 1979) was in error. At no time did I ever see any postings of my rights under Equal Employment Opportunity law on the premises of Saint Francis College, nor had I received any advice from any person that the "time" for filing my charge was 90 or 300 days from February 10, 1978, the date of the Tenure Committee vote.

5. I received a notice from the PHRC that they were closing my case for lack of jurisdiction based upon my not having filed within 90 days, and because I had filed a civil complaint May 10, 1979. I did not have any hearing of the merits of

my complaint at the PHRC. Although I was in contact with the Commission repeatedly from September 14, 1978 through May 1979, they never told me to file, and indeed told me I could not file until May 25, 1979. Nor did my then-lawyer, or PHRC ever tell me that filing my breach of contract suit in State court would deprive them of jurisdiction to hear my discrimination complaint. My faith in the Commission was shaken, and I decided that it was useless to appeal their decision of no jurisdiction. However, I contacted EEOC, who issued to me a right-to-sue letter permitting me to sue under Title VII. I sued pro se October 30, 1980, within the 90-day period on the face of my right-to-sue letter dated August 6, 1980.

* * *

(Jurat omitted in printing)

s/
Majid Gaidan Al-Khazraji

ORDER OF SUPREME COURT OF
UNITED STATES GRANTING CERTIORARI

"The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition. The case is set for oral argument in tandem with No. 85-2156, Shaare Tefila Congregation v. Cobb. Justice Scalia took no part in the consideration or decision of this petition."

Supreme Court, U.S.
FILED
DEC 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-2169

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities,

Petitioners

v.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

December 1986

Nick S. Fisfis, Esq.
Attorney for Petitioners
5504 Annetta Drive
Bethel Park, PA 15102
(412) 434-6289

68pp

QUESTIONS PRESENTED

1. Does a claim by an "Arab" who is admittedly Caucasian, i.e., racially white, when he is presumably claiming other Caucasians or whites were improperly favored over him, constitute an allowable racial or any other allowable claim under 42 U.S.C. § 1981?

2. In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), the United States Court of Appeals for the Third Circuit concluded that the ruling of this Court in Wilson v. Garcia, ____ U.S.____, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under 42 U.S.C. § 1981.

The question presented is:

Did the court of appeals err in applying Chevron Oil Co. v. Huson and Wilson v. Garcia when it refused to apply

the two-year statute retroactively and instead held that its decision in Goodman would not be applied retroactively to § 1981 causes of action accruing, it would appear, after 1977 and for some period after.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the respondent, Majid Ghaidan Al-Khazraji a/k/a Majid Al-Khazraji Allan, and the petitioners, Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, individually and in their official capacities.

Petitioner, Saint Francis College, has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 784 F.2d 505 and is present in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter sometimes Petition), p. 1a.

The Memorandum Opinion of the United States Court for the Western District of Pennsylvania (Mencer, D.J.) has not been reported. It is present in the Appendix to the Petition, p. 34a.

The Opinion of the United States Court for the Western District of Pennsylvania (Ziegler, D.J.) is reported at 523 F.Supp. 386. It is present in the Appendix to the Petition, p. 46a.

JURISDICTION

The United States Court for the Western District of Pennsylvania had jurisdiction of the claim under 42 U.S.C.

§ 1981, except to the extent that issues herein may operate to remove jurisdiction. On March 12, 1985, the District Court granted petitioners' motion for summary judgment in favor of each of the petitioners. See Petition Appendix 34a.

On respondent's appeal, the United States Court of Appeals for the Third Circuit on March 3, 1986, entered a judgment and an opinion reversing the judgment below and remanding for further proceedings consistent with the Opinion of the Court. See Petition Appendix 1a.

The Court of Appeals denied a timely petition for rehearing on April 4, 1986. See Petition Appendix 80a.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

The named petitioners in this proceeding (defendants in the trial court) are Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, individually and in their official capacities. The nine named natural persons were members of the Saint Francis College Committee on Tenure at the time of the Committee's negative vote on the tenure application of respondent, a former faculty member at petitioner college, in February of 1978. Respondent's 42 U.S.C. § 1981 claim of discrimination in denying him tenure is the portion of the proceeding before the Court and the subject of this Brief.

Three complaints were filed on behalf of respondent, Majid G. Al-Khazraji, in the United States Court for the Western

District of Pennsylvania.

The first was filed pro se on October 30, 1980, against petitioner, Saint Francis College, only. The alleged basis for relief in that complaint is a violation of Title VII of the Civil Rights Act of 1964, as amended.[1] (J.A. 16)

The second complaint, labeled "Amended Complaint," was filed by prior counsel for respondent on November 7, 1980, against petitioner, Saint Francis College, and nine members of its faculty and administration (the nine named petitioners) individually and in their official capacities. This Amended Complaint [hereinafter sometimes Amended Complaint or Amended Complaint I] is in

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[1] References to (J.A. __) are to the Joint Appendix. References to (Appendix __a) are to the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

three counts. Count I charges a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Count II charges a violation of 42 U.S.C. §§ 1985(3) and 1986. While Paragraph 2 of Amended Complaint I states that this action arises under 42 U.S.C. §§ 1981, 1983, 1985(3), and 2000e, Count II in the Claims for Relief portion of Amended Complaint I restricts itself to 42 U.S.C. §§ 1985(3) and 1986. Count III raises certain state claims, which are alleged to be pendent to the federal claims. (J.A. 22)

The third complaint, labeled "Amendment to Civil Action Complaint No. 80-1550 filed at the United States District Court for the Western District of Pennsylvania," was filed pro se on November 10, 1980, against petitioner, Saint Francis College, and eight of the

nine persons named in the second complaint. (J.A. 51) In this third complaint [hereinafter sometimes referred to as Amended Complaint II], the alleged basis for relief is a violation of Title VII of the Civil Rights Act of 1964, as amended.

Pre-trial motions in essence to dismiss were filed. Portions were granted and portions were denied by District Judge Ziegler. Dismissal of the 42 U.S.C. § 1981 claim was denied. Al-Khazraji v. Saint Francis College, 523 F.Supp. 386 (W.D.Pa. 1981). District Judge Ziegler, in a pre-Wilson v. Garcia, _____ U.S. _____, 105 S.Ct. 1938 (1985), situation, following Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978), applied a six-year statute of limitations. As to the underlying elements of a § 1981 claim, Judge Ziegler, in essence, read the three

complaints filed by respondent together. Even though Amended Complaint I, the only complaint which mentioned a § 1981 claim and the one which he treated as the operative amendment, did not mention race, (Appendix 70a- 71a and 73a) Judge Ziegler concluded, inter alia, that respondent was making a claim that he was denied tenure because he is an "Arabian born in Iraq," (Appendix 71a) and that such a claim may serve as the basis for a civil rights action under 42 U.S.C. § 1981.

The attorney-prepared complaint (Amended Complaint I), the one treated by Judge Ziegler as the operative amendment, charged discrimination on the basis of national origin and religion. As previously stated, it did not mention race. None of the three complaints contained an allegation of discrimination because of color. In the three federal

court complaints (J.A. 16, J.A. 22, J.A. 51) respondent (hereinafter sometimes plaintiff) twice claimed "Muslim, Arabian, and Iraqi in national origin," once claimed "national origin and religion," and also claimed "national origin (Iraq), religion (Muslim), and/or race (Arabian)."

At his deposition in July of 1982, plaintiff stated, at pp. 6, 7-8 (J.A. 66-69) [This matter is discussed at greater length at pp. 6-9 of plaintiff's deposition. (J.A. 66-71)]:

> Q. Are you also taking the position that you were denied tenure because of your race?
>
> A. Yes.
>
> Q. What is your race?
>
> A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion. [p. 6]

* * *

Q. What other reasons did you say you feel you were discriminated against?

A. National origin and religion or a combination of the two.

Q. What is your national origin?

A. Arabian and Iraqie.

Q. Are both Arabian and Iraqie-

A. and Moslem.

Q. Are both Arabian and Iraqie national origin designations?

A. Iraq is part of Arabia.

Q. You are treating Arabia as a place of national origin?

A. You may say so. This is what we call the Arabian peninsula.

Q. That is the geographical area?

A. That's right. This separates it from Iraq, Pakistan and so forth. It makes the Arabian peninsula separate. [pp. 7-8]

Petitioners thereafter moved for summary judgment. This motion was granted and judgment was entered in favor of each of the petitioners. As to the

§ 1981 aspect, District Judge Mencer stated, in part (Appendix 37a-39a):[2]

> Additionally, plaintiff does not qualify as a member of a protected minority under § 1981. Section 1981 is generally considered to apply only to racial and alienage discrimination, 3 A. Larson, Employment Discrimination, § 71.00 et seq.; 4 A. Larson, Employment Discrimination, § 94.00 et seq. The Amended Complaint alleges discrimination on the basis of national origin and religion, and not on the basis of race or alienage. Accordingly, the alleged acts of discrimintion here are not within the scope of 42 U.S.C. § 1981.
>
> Even if the Amended Complaint were to be read as making a racial claim under § 1981, plaintiff factually does not qualify as a protected minority member. At his deposition plaintiff stated:
>
> > Q. Are you also taking the position that you were denied tenure because of your race?

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[2]By implication, Judge Mencer treated the attorney-prepared complaint (Amended Complaint I) as the operative complaint.

A. Yes.

Q. What is your race?

A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion.

Plaintiff is claiming that he was discriminated against because of his national origin, Iraq, his ancestry, Arabian, and his religious creed, Muslim. A claim of discrimination on the basis of being an Iraqi or Arab is not cognizable under § 1981. Ibrahim v. New York State Department of Health, 581 F. Supp. 228 (E.D.N.Y. 1984).

Accordingly, we must conclude that plaintiff is unable to establish a prima facie § 1981 case.

On appeal, the judgment of the district court was reversed and the case was remanded for proceedings consistent with the opinion, Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986), cert. granted, 107 S.Ct. 62

(1986).

The United States Court of Appeals for the Third Circuit held that "ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them." The Court concluded that "Congress's purpose [in enacting § 1981] was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive." [Footnote number omitted.] (Appendix 24 a) The Court added that, "Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens." (Appendix 25a) It concluded its discussion of this aspect of § 1981

liability by stating [Footnote is omitted.]:

> . . . However, where a plaintiff comes into federal court and claims that he has been discriminated against because of his race, we will not force him first to prove his pedigree. We are unwilling to assert that Arabs cannot be the victims of racial prejudice: "prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is a usage or image based on all the mistaken concepts of 'race.'" Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979).[17]
>
> Accordingly, Al-Khazraji should be allowed the opportunity to prove that the discrimination he alleges is racially motivated within the meaning of Section 1981. (Appendix 26a-27a)

As to the contention of respondents that the statute of limitations had run as to the § 1981 claim, the Third Circuit noted that it had concluded in Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), that the ruling of the Supreme

Court in Wilson v. Garcia, _____ U.S. _____, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under § 1981. However, in applying Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), the Third Circuit refused to apply the two-year statute of limitations and instead held that its decision in Goodman would not be applied to § 1981 causes of action accruing, it would appear, after 1977 and for some period after.

SUMMARY OF ARGUMENT

1. The decision of the Third Circuit applying 42 U.S.C. § 1981 to an "Arab" who is Caucasian erroneously extends the scope of § 1981.

As to the race and 42 U.S.C. § 1981 claims, it is respectfully submitted that the Third Circuit erred in concluding that plaintiff may sue under 42 U.S.C. § 1981, even though, based on his own deposition testimony, plaintiff is Caucasian, i.e., racially white, and, therefore, not a protected person under § 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him.

The Third Circuit's decision here directly conflicts with the decision of the Fourth Circuit in Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), cert. granted, 107 S.Ct. 62 (1986), interpreting the race

discrimination provisions of 42 U.S.C. §§1981 and 1982 and holding that "discrimination against Jews is not racial discrimination." 785 F.2d at 527.

This Court, in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 2189 (1968), noted that [42 U.S.C. § 1982] "deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin." The limitation of § 1982 to racial discrimination applies equally to 42 U.S.C. § 1981.

In the state discrimination complaints filed by plaintiff prior to filing the federal court case plaintiff never claimed racial bias. In the three federal court complaints he twice claimed "Muslim, Arabian, and Iraqi in national origin," once claimed "national origin and religion," and also claimed "national

origin (Iraq), religion (Muslim), and/or race (Arabian)." Race here thus is not used by Plaintiff in the § 1981 racial sense, but instead in a national origin sense. Furthermore, as previously noted, this term is not used in the Amended Complaint which is the operative one as to § 1981 and the only one which raises a § 1981 claim. At his deposition in July of 1982, plaintiff stated, in part, at pp. 6 (J.A. 66-67):

> Q. Are you also taking the position that you were denied tenure because of your race?
>
> A. Yes.
>
> Q. What is your race?
>
> A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion. [p. 6]

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976),

is not inconsistant with the view that § 1981 does not apply to a claim by a Caucasian when he or she is presumably claiming other Caucasians or whites were improperly favored over him. Indeed, it is cogent authority for limiting § 1981 to racial discrimination.

A claim based on status as an Arab or an Iraqi, it is submitted, is a national origin claim, not a racial claim. If such a claim is treated as a racial claim, then it is difficulty to see much, if any, basis for limiting the extent to which national origin claims are also racial ones. The Third Circuit here has defined race, for § 1981 purposes, as "membership in a group that is ethnically and physiognomically distinctive." (Appendix 24a). The net result appears to be a substantial expansion in the scope of § 1981 beyond the language of the statute and, based on the discussion

of the legislative history in the concurring opinion of Judge Adams, "well beyond what Congress intended when it passed the law.[1]" [Footnote is omitted.] (Appendix 32a) Additionally, to the extent that applying § 1981 to allegations of purely private conduct is viewed as beyond the intended scope of § 1981 (See dissenting opinion of Mr. Justice White in Runyon v. McCreary, supra, 427 U.S. at 192-214), there is that much less reason to extend § 1981 to the type of situation present here.

Furthermore, as a matter of policy, it is respectfully submitted that expansion of 42 U.S.C. § 1981 is inconsistent with the statutory scheme of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which specifically covers national origin discrimination. While the passage of Title VII did not work an implied

repealer of § 1981, no reason of policy appears to justify expansion of § 1981 in light of the existence of Title VII.

2. The decision of the Third Circuit not to apply its decision in Goodman v. Lukens Steel retroactively conflicts in principle with this Court's decision in Chevron Oil Co. v. Huson.

In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), cert. granted, No. 85-1626 (U.S. Sup. Ct. December 1, 1986) (available on Lexis, Genfed library, US file), the Third Circuit concluded that the ruling of this Court in Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under 42 U.S.C.§ 1981. The Third Circuit also applied the decision retroactively to a § 1981 action commenced in 1973. However, in the instant case, Al-

Khazraji, the Third Circuit, in applying Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), refused to apply the two year statute retroactively and instead held that its decision in Goodman would not be applied retroactively to § 1981 causes of action accruing, it would appear, after 1977 and for some period after. As previously stated, the denial of tenure was in February of 1978.

On the underlying retroactivity issue, as the Third Circuit noted, Chevron requires the federal courts to undertake a three-part analysis [citations are omitted.]:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior

> history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retrospective application, for [w]here a decision of this Court could produce substantially inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."
>
> 404 U.S. at 106-07.

Essentially, the Third Circuit's theory was that after 1977 the precedents in the circuit were sufficiently clear that plaintiff could reasonably have relied on them. Petitioners submit, first, that the precedents were not as clear as the opinion of the Third Circuit indicates. The opinion here in Al-Khazraji relies primarily on Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978), as making it "absolutely clear that the six-year limitations

period for contract actions applied to Section 1981 actions brought to redress employment discrimination." (Appendix 16a).

Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978) [hereinafter sometimes Davis], however, did not apply a six year statute of limitations generally to section 1981 actions. In fact, specific language in the Davis opinion rejects the Third Circuit's reliance on Davis as making it "absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination." Furthermore, Davis was a discharge case and not a denial of tenure case. Counsel for petitioner is not aware of any Third Circuit case or case decided by a District Court in the Circuit, decided prior to the filing of the instant case

in November of 1980, that held that the six year statute of limitations applied to a § 1981 denial of tenure case. Furthermore, since Davis was decided under an earlier version of the Pennsylvania statute of limitations scheme, there cannot have been justifiable reliance on Davis in view of a 1978 revision of the Pennsylvania statute of limitations scheme, particularly as the record shows that petitioner had counsel at least as early as May, 1979, well before the two year statute of limitations would have run. The Third Circuit itself stated in Smith v. City of Pittsburgh, 764 F.2d 188, 195 n. 3 (3d Cir. 1985), an earlier case applying Wilson v. Garcia retroactively to a 1983 claim, that the 1978 statutory revision undercut the precedential value of Davis.

In view of the status nationally of statute of limitation periods under the various Civil Rights Acts, as discussed in Smith v. City of Pittsburgh, 764 F.2d 188, 192-193 (3d Cir. 1985) and, in great detail, in Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), aff'd, ___ U.S. ___, 105 S.Ct. 1938 (1985), the determination of what is "precedent on which litigants may have relied" (Chevron, 404 U.S. at 106) is not limited to precedent of the Third Circuit, but is to be determined on a national basis. On such a basis there was no precedent on which respondent may have relied. As this Court said in Wilson v. Garcia, 105 S.Ct. at 1942, "Thus, the conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons for granting certiorari." The

situation as to § 1981 was no clearer. It is described in 3 A. Larson, Employment Discrimination, § 90.20, at pp. 18-23-18-36, in a release as of November of 1984, as follows [Footnotes and footnote numbers are omitted.]: "Decisions vary from state to state, with some states using the statute of limitations for contract actions, tort actions, actions for the recovery of wages, or actions brought under antidiscrimination or other state or Federal statutes."

ARGUMENT

I.

The decision of the Third Circuit applying 42 U.S.C. § 1981 to an "Arab" who is Caucasian erroneously extends the scope of § 1981.

As to the race and 42 U.S.C. § 1981 claims, it is respectfully submitted that the Third Circuit erred in concluding that plaintiff may sue under 42 U.S.C. § 1981, even though, based on his own deposition testimony, plaintiff is Caucasian, (Appendix 38a) i.e., racially white, and, therefore, not a protected person under § 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him.[3] This is the first case, to the knowledge of

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[3] It may be of significance that the EEOC, Government-Wide Standard Race/Ethnic Categories, 42 Fed. Reg. 17,900 (1977), read, inter alia: "1. White, not of Hispanic Origin.--Persons having origins in any of the original peoples of Europe, North Africa, or the Middle East."

counsel for petitioners, that has held that a claim of discrimination on the basis of being an Iraqi or Arab is cognizable under § 1981 and one case, Ibrahim v. New York State Department of Health, 581 F.Supp. 228 (E.D.N.Y. 1984), has held squarely to the contrary.[4]

The Third Circuit's decision here directly conflicts with the decision of the Fourth Circuit in Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), cert. granted, 107 S.Ct. 62 (1986), interpreting the race

[4]In one previous case, Abdulrahim v. Gene B. Glick Co., Inc. 612 F.Supp. 256 (N.D. Ind. 1985), the District Court held that an allegation that a Palestinian/Syrian was "non-white" was sufficient to make out a § 1981 claim. As noted previously, there is no such allegation of color in the complaints here.

Since the filing of the instant case by the Third Circuit, the Fifth Circuit, citing Al-Khazraji, applied § 1981 to a woman who was married to an Iranian. See Alizadeh v. Safeway Stores, 802 F.2d 111 (5th Cir. 1986).

discrimination provisions of 42 U.S.C. §§1981 and 1982. In Shaare Tefila Congregation, the Fourth Circuit held that "discrimination against Jews is not racial discrimination." 785 F.2d at 527. While Shaare Tefila Congregation did not involve Arabs, any difference between "Arabs" and "Jews" would not prevent Al-Khazraji and Shaare Tefila Congregation from being substantially indistinguishable for § 1981 coverage purposes.

As background to the present § 1981 issue, this Court, in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 2189 (1968), stated: ". . . In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968 . . . the statute [§ 1982] deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin."

(Emphasis supplied) Although Jones v. Alfred H. Mayer Co., was concerned with 42 U.S.C. § 1982, the limitation of § 1982 to racial discrimination applies equally to 42 U.S.C. § 1981. See Runyon v. McCrary, 427 U.S. 160, 96 S. Ct. 2586 (1976); Georgia v. Rachel, 384 U.S. 780, 791, 86 S.Ct. 1783, 1789 (1966).[5]

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[5]42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

As to the argument that the reach of § 1981 and of § 1982 differ as to purely private conduct, see the dissenting opinion of Mr. Justice White, with whom now Mr. Chief Justice Rehnquist joins, to Runyon v. McCrary, 427 U.S. 160, at 192-214. Mr. Justice Powell and Mr. Justice Stevens, in separate concurring opinions, indicate in Runyon that were it not for recent precedents, they would tend to agree with Mr. Justice White's analysis that § 1981 does not apply to private conduct.

In Runyon v. McCrary, supra, 427 U.S. at 167-68, this Court stated:

> It is worth noting at the outset some of the questions that these cases do not present . . . . They do not present any questions of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds. Rather, these cases present only two basic questions: whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied. [Footnote number omitted.]

In Georgia v. Rachel, supra, 384 U.S. at 791, commenting on the Civil Rights Act of 1866 [now 42 U.S.C. § 1981 in slightly changed form], the Court noted that the phrase "any law providing for . . . equal civil rights" was not

intended and should not be construed to apply to discrimination on any basis other than race:[6]

> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase 'as is enjoyed by white citizens.' That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected." [Footnote number omitted.]

It should be noted that in the state discrimination complaints filed by plaintiff prior to filing the federal court case plaintiff never claimed racial bias. In the state court action he

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[6] In Runyon v. McCreary, 427 U.S. 160, at 195, Mr. Justice White, dissenting, views § 1981 as derived solely from § 16 of the Voting Rights Act of May 31, 1870, 16 Stat. 144, and not in part from the Civil Rights Act of 1866, as held by the Court.

claimed "ethnic (Arab) and religious (Muslim) background were involved and included" (Exhibit E-3 to Motion for Summary Judgment -- p. 6 of state Amended Complaint) (J.A. 75) and in the Pennsylvania Human Relations Commission complaint, (Exhibit A to Motion for More Definite Statement, etc., of January 23, 1981) (J.A. 63) which it is believed was also the EEOC complaint, "have discriminated against me because of my national origin, Iraq, my ancestry Arabian, and my religious creed Muslim." In the three federal court complaints (J.A. 16, J.A. 22, J.A. 51) he twice claimed "Muslim, Arabian, and Iraqi in national origin," once claimed "national origin and religion," and also claimed "national origin (Iraq), religion (Muslim), and/or race (Arabian)." Race here thus is not used by Plaintiff in the § 1981 racial sense, but instead in a

national origin sense. Furthermore, as previously noted, this term is not used in the Amended Complaint which is the operative one as to § 1981 and the only one which raises a § 1981 claim. At his deposition in July of 1982, plaintiff stated, at pp. 6, 7-8 (J.A. 66-69) [This matter is discussed at greater length at pp. 6-9 of plaintiff's deposition. (J.A. 66-71)]:

> Q. Are you also taking the position that you were denied tenure because of your race?
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>
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>
> * * *
>
> Q. What other reasons did you say you feel you were discriminated against?

A. National origin and religion or a combination of the two.

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Q. Are both Arabian and Iraqie -

A. and Moslem.

Q. Are both Arabian and Iraqie national origin designations?

A. Iraq is part of Arabia.

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Q. That is the geographical area?

A. That's right. This sepa- rates it from Iraq, Pakistan and so forth. It makes the Arabian peninsula separate. [pp. 7-8]

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), is not inconsistant with the view that § 1981 does not apply to a claim by a Caucasian when he or she is presumably claiming other Caucasians or whites were improperly favored over him. Indeed, as

viewed in 3 A. Larson, Employment Discrimination, § 94.10, at p. 20-7 [Footnote is omitted.]:

> Indeed, the case [McDonald] is, if anything, one of the most cogent authorities available to support the limitation of § 1981 to racial discrimination, because, in its extended discussion of the point, the Court repeatedly and exclusively speaks of race, or of "black" and "white," beginning with the quotation of its own earlier description [in Georgia v. Rachel, 384 U.S. 780, 791 (1966)] of the "white citizens" phrase as emphasizing "the racial character of the rights being protected."[26]

A claim based on status as an Arab or an Iraqi, it is submitted, is a national origin claim, not a racial claim.[7] If such a claim is treated as a racial claim, then it is difficulty to see much, if any, basis for limiting the extent to which national origin claims are also

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[7]As noted previously, there is no allegation of discrimination based on "color" in the federal court complaints here.

racial ones. The Third Circuit here has defined race, for § 1981 purposes, as "membership in a group that is ethnically and physiognomically distinctive." (Appendix 24a). The net result appears to be a substantial expansion in the scope of § 1981 beyond the language of the statute and, based on the discussion of the legislative history in the concurring opinion of Judge Adams, "well beyond what Congress intended when it passed the law.[1]" [Footnote is omitted.] (Appendix 32a) Additionally, to the extent that applying § 1981 to allegations of purely private conduct is viewed as beyond the intended scope of § 1981 (See dissenting opinion of Mr. Justice White in Runyon v. McCreary, supra, 427 U.S. at 192-214), there is that much less reason to extend § 1981 to the type of situation present here.

Furthermore, as a matter of policy, it is respectfully submitted that expansion of 42 U.S.C. § 1981 is inconsistent with the statutory scheme of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which specifically covers national origin discrimination and under which, as noted by this Court in Great American Federal Savings & Loan Association v. Novotny, 422 U.S. 366 (1979), cases are "subject to a detailed administrative and judicial process designed to provide an opportunity for non-judicial and nonadversary resolution of claims." While this Court has "held that the passage of Title VII did not work an implied repealer of the substantive rights to contract conferred by the . . .statute codified at . . . § 1981," Novotny at 377, no reason of policy appears to justify expansion of

§ 1981 in light of the existence of Title VII.

As to the effect of the expansion here of § 1981, Judge Adams, in his concurring opinion, notes in footnote 1 (Appendix 32a):

> In light of the continual flow of immigrants to the United States, the consequences of this expansion are quite substantial. Persons from most of the Middle East and Asia, for example, would now appear able to sue under § 1981. As of 1980, there were 2,539,800 persons born in Asia living in the United States, as well as 43,400 from Egypt and 71,500 from North Africa. United States Department of Commerce, Bureau of Census, Statistical Abstract of the United States (1985), at 37. I do not mean to suggest that this inflow is in any way undesirable; the figures, rather, point up the extent of the expansion of the statute, which underpins, I believe, the need for Congress, as opposed to the judiciary, to decide on the appropriateness of this result.

One of the potential difficulties possibly present in the approach of the

Third Circuit here is expressed in the following excerpt from the decision in Sere v. Board of Trustees of the University of Illinois, 628 F.Supp. 1543, 1546 (N.D. Ill. 1986) [Footnote and footnote number are omitted.]:

> Sere argues that he is a Nigerian black, while his supervisor and replacement are American blacks with lighter skin pigmentation. But this is insufficient to save Count II. It is settled law in this circuit that discrimination on the basis of national origin is not actionable under § 1981, Anooya v. Hilton Hotels Corp., 733 F.2d 48, 50 (7th Cir. 1984), and although the court recognizes that discrimination based on skin color may occur among members of the same race, plaintiff is unable to offer any authority for the novel proposition that such discrimination may form the basis of a cause of action under § 1981. This court refuses to create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit. Count II must therefore be dismissed.

For the foregoing reasons, as to the § 1981 issue, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the order of the District Court reinstated and affirmed and judgment be entered in favor of each of the petitioners and against plaintiff respondent.

II

The decision of the Third Circuit not to apply its decision in **Goodman v. Lukens Steel** retroactively conflicts in principle with this Court's decision in **Chevron Oil Co. v. Huson**.

In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), cert. granted, No. 85-1626 (U.S. Sup. Ct. December 1, 1986) (available on Lexis, Genfed library, US file), the Third Circuit concluded that the ruling of this Court in Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under 42 U.S.C. § 1981. The Third Circuit also applied the decision retroactively to a § 1981 action commenced in 1973. However, in the instant case, Al-Khazraji, the Third Circuit, in applying Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), refused to

apply the two year statute retroactively and instead held that its decision in Goodman would not be applied retroactively to § 1981 causes of action accruing, it would appear, after 1977 and for some period after.[8] As

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[8]Petitioners argued to the Third Circuit that Goodman itself held that the decision applying the Pennsylvania two year statute of limitations is to be applied retroactively. In the Post-Argument Submission of Appellees [Petitioners] in Response to Supplemental Brief of Appellant, at p. 2, petitioners argued:

> This Court [the Third Circuit], at p. 13 of the Slip Opinion [in Goodman], stated:
>
> "We hold, therefore, that the personal injury statute of limitations of the forum state supplies the most analogous statute of limitations for actions brought under § 1981. For the reasons set forth in Smith v. City of Pittsburgh, we also conclude that our decision should be given the customary retroactive effect. See Fitzgerald v. Larson, 769 F.2d 160 (3d Cir. 1985)."

previously stated, the denial of tenure was in February of 1978.

A summary of the status of retroactivity decisions nationally under the various Civil Rights Acts is presented in the dissent by Mr. Justice White to the denial of certiorari in Mulligan v. Hazard, 777 F.2d 340, cert.

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There is no intimation in the opinion that the statement as to the "decision [being] given the customary retroactive effect. See Fitzgerald v. Larson, 769 F.2d 160 (3d Cir. 1985)" is restricted to the litigants in that case, rather than being a statement of general scope applicable to all Pennsylvania litigants, including those in the case here. Certainly, there is no indication in Fitzgerald v. Larson, 769 F.2d 160 (3d Cir. 1985) [hereinafter sometimes Fitzgerald], cited by the Court in Goodman as authority for retroactivity in Goodman, that the retroactivity decision there is not of general applicability to litigants other than the immediate ones in Fitzgerald.

denied, 106 S. Ct. 2902, 2903 (1986):[9]

> In Wilson v. Garcia, ____ U.S. ___ (1985), we held that an action brought under 42 U.S.C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state statute of limitations. Since our decision in that case, the courts of appeals have differed on whether Wilson should be given retroactive effect. In the present case, the Sixth Circuit held, without qualification, that Wilson should be given retroactive effect. 777 F.2d 340 (1985). The Courts of Appeals for the Fifth and Eleventh Circuits have reached similar results. Gates v. Spinks, 771 F.2d 916 (CA5 1985), cert. denied, ___ U.S. ___ (1986); Jones v. Preuit & Mauldin, 763 F.2d 1250 (CA11 1985), cert. denied, ___ U.S. ___ (1986). Two other courts of appeals, however, have determined that when retroactive application would

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[9]The Seventh Circuit has also dealt with the issue in Anton v. Lehpamer, 787 F.2d 1141 (7th Cir. 1986) (nonretroactive), as has the Eleventh Circuit in Williams v. City of Atlanta, 794 F.2d 624 (11th Cir. 1986) (retroactive) and the Eighth Circuit in Ridgway v. Wapello County, 795 F.2d 646 (8th Cir. 1986) (nonretroactive).

shorten the statute of limitatioons, Wilson merits only prospective relief. Gibson v. United States, 781 F.2d 1334 (CA9 1986); Jackson v. City of Bloomfield, 731 F.2d 652 (CA10 1984). Although the Third and Eighth Circuits have applied Wilson retroactively in certain cases, it is unclear whether their holdings are designed to have universal application. See Wycoff v. Menke, 773 F.2d 983, 986-987 (CA8 1985); Fitzgerald v. Larson, 769 F.2d 160, 162-164 (CA3 1985); Smith v. City of Pittsburgh, 764 F.2d 188, 194-196 (CA3 1985).

In addition, the courts of appeals also have reached conflicting results concerning what should be done when more than one state statute of limitations applies to personal injury actions. In Hamilton v. City of Overton Park, 730 F.2d 613 (1984) (en banc), cert. denied, ___ U.S. ___ (1985), and Mishmash v. Murray City, 730 F.2d 1366 (1984) (en banc), cert. denied, ___ U.S. ___ (1985), the Tenth Circuit rejected, for § 1983 purposes, the state statute of limitations for intentional torts, and chose instead a state's residual statute of limitations. See generally Preuit & Mauldin v. Jones, ___ U.S. ___, ___-___ (1986) (White J. dissenting from the denial

> of certiorari). The Eleventh Circuit in Jones v. Preuit & Mauldin, supra, the Fifth Circuit in Gates v. Spinks, supra, and the Sixth Circuit in the present case, however, follow a different rule, and select the state statute of limitations governing intentional torts.

While the instant case involves section § 1981, rather than § 1983, the retroactivity issues are similar, if not identical. It should be noted that the three retroactivity cases in which certiorari was denied--Gates, Jones and Mulligan--are cases which are categorized as those in which Wilson v. Garcia was given retroactive effect.

On the underlying retroactivity issue, as the Third Circuit noted, (Appendix 13a-14a), Chevron requires the federal courts to undertake a three-part analysis [citations are omitted.]:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear

> past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retrospective application, for [w]here a decision of this Court could produce substantially inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."
>
> 404 U.S. at 106-07.

Essentially, the Third Circuit's theory was that after 1977 the precedents in the circuit were sufficiently clear that plaintiff could reasonably have relied on them. Petitioners submit, first, that the precedents were not as clear as the opinion of the Third Circuit indicates. The opinion here in Al-

Khazraji relies primarily on Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978), as making it "absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination." (Appendix 16a).

A number of comments should be made in response to this statement in the opinion. First, Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978) [hereinafter sometimes Davis], did not apply a six year statute of limitations generally to section 1981 actions. The opinion specifically states, at 341 n. 8: "We reiterate that, for statute of limitations purposes, each complaint and different aspects of the same complaint may be treated differently. We hold only that 12 P.S. [section] 31 applies to actions where the gist of a [section]

1981 complaint concerns racially discriminatory discharge of an employee under the facts in this record." (Emphasis supplied.)[10] Thus, from Davis itself, it was not "absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination." Furthermore, Davis was a discharge case and not a denial of tenure case. Counsel for petitioner is not aware of any Third Circuit case or case decided by a District Court in the Circuit, decided prior to the filing of the instant case in November of 1980, that held that the six year statute of limitations applied to a § 1981 denial of tenure case. Furthermore, since Davis

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[10]As counsel for petitioners reads Davis, the Third Circuit did not decide whether the tort action not involving personal injury portion or the contract portion of former 12 P.S. 31 made the six year statute applicable there.

was decided under an earlier version of the Pennsylvania statute of limitations scheme, it is submitted that there cannot have been justifiable reliance on Davis in view of a 1978 revision of the Pennsylvania statute of limitations scheme, particularly as the record shows that petitioner had counsel at least as early as May, 1979, well before the two year statute of limitations would have run.[11] (J.A. 93) As the Third Circuit

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[11] The new Pennsylvania statutory scheme is discussed in more detail in the opinion of Judge Ziegler, at Appendix 60a-65a.

One Pennsylvania federal court borrowed the following language in an attempt to explain, at least in part, the revision:

> [P]eriods applicable to conversion of or injury to personal property and waste or trespass to real property are reduced from six to two years to conform to the modern principle that claims based on conduct, and hence heavily relying on unwritten evidence, should have relatively short statutes of limitations, so as to bring them

itself noted in Smith v. City of Pittsburgh, 764 F.2d 188, 195 n. 3 (3d Cir. 1985), an earlier case applying Wilson v. Garcia retroactively to a § 1983 claim:

> In all of the earlier cases applying the six-year limitation, there was a

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> to trial (after allowance for trial delays) before memories have faded.

Fickinger v. C. I. Planning Corp., 556 F. Supp. 434, 439 (E.D. Pa. 1982), quoting The Special Committee on the Judicial Code of the Pennsylvania Bar Association, Explanatory Memoranda Relating to the Proposed Judicial Code 17 (1973).

Chronologically, respondent filed the state law suit in May of 1979 and it was not until after the state (Exhibit B-3 to Motion for More Definite Statement, etc., of January 23, 1981) and federal (J.A. 50) administrative agencies refused relief in May and August 1980 respectively that he filed suit in October 1980. In addition, it should be remembered that neither of his pro se complaints raised a section 1981 claim and, as discussed in Statement of the Case, at p. 6, serious doubt exists that such a claim was raised in the "Amended Complaint" filed on November 7, 1980.

challenge to the legality of the substantive basis for the termination. See, e.g., Davis v. United States Steel Supply, 581 F.2d at 338 (racially motivated discharge); Skehan v. Trustees of Bloomsburg State College, 590 F.2d at 477 (First Amendment discharge and procedural due process without discussion of any distinction). Pennsylvania's 1978 revision of its statute of limitations scheme undercut the precedential value of these earlier decisions. The district courts relied on the new statute in selecting a six-month or two-year statute of limitations rather than the six-year residuary period applied to Skehan and Davis. See cases cited in text at p. 193 supra.

It should be specifically noted that Davis, the case primarily relied upon by the Third Circuit here in Al-Khazraji, is one of the cases whose precedential value the Third Circuit in Smith characterized as undercut by the 1978 revision.

It is also submitted that in view of the status nationally of statute of limitaation periods under the various Civil Rights Acts, as discussed in Smith

v. City of Pittsburgh, 764 F.2d 188, 192-193 (3d Cir. 1985) and, in great detail, in Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), aff'd, ___ U.S. ___, 105 S.Ct. 1938 (1985), the determination of what is "precedent on which litigants may have relied" (Chevron, 404 U.S. at 106) is not limited to precedent of the Third Circuit, but is to be determined on a national basis. On such a basis there was no precedent on which respondent may have relied. As this Court said in Wilson v. Garcia, 105 S.Ct. at 1942, "Thus, the conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons for granting certiorari." The situation as to § 1981 was no clearer. It is described in 3 A. Larson, Employment Discrimination, § 90.20, at

pp. 18-23-18-36, in a release as of November of 1984, as follows [Footnotes and footnote numbers are omitted: "Decisions vary from state to state, with some states using the statute of limitations for contract actions, tort actions, actions for the recovery of wages, or actions brought under antidiscrimination or other state or Federal statutes."[12]

For the foregoing reasons, as to the § 1981 issue, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the order of the District Court reinstated and affirmed and judgment be entered in favor of each of the petitioners and against plaintiff-respondent.

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[12]The § 1981 statute of limitations situation is also discussed in Comment, Developments in the Law-Section 1981, 15 Harvard Civil Rights Civil Liberties Law Review 29, 222-235 (1980).

CONCLUSION

For the foregoing reasons, as to the § 1981 issue, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the order of the District Court reinstated and affirmed and judgment be entered in favor of each of the petitioners and against plaintiff-respondent. As to the pendent state claims, the case should be remanded for proceedings consistent with the dismissal of the § 1981 claim.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SAINT FRANCIS COLLEGE, *et al.*,
Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a
MAJID AL-KHAZRAJI ALLAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1981 prohibit discrimination on the basis of ancestry?

2. Did the court of appeals err in refusing to apply retroactively that court's decision in Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985)?

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Cong. Globe, 39th Cong.,
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Cong. Globe, 34th Cong.,
1st Sess. (1856) 81

53 Cong. Rec. (1916) 21,34

Sen. Doc. No. 662, 61st Cong.,
3d Sess. (1911) 20

Page

Sen. Doc. No. 747, 61st Cong., 1st Sess. (1911) 19,71

H.R. Rep. No. 95, 64th Cong., 1st Sess. (1916) 21

Dictionaries and Encyclopedias:

American College Dictionary 65

W. Bolles, An Explanatory and Phonographic Pronouncing Dictionary of the English Language (1847) 55

Century Dictionary and Cyclopedia (1911) 61-63

Chambers' Twentieth Century Definition of the English Language (1908) 64

H. Clark, A New and Comprehensive Dictionary of the English Language (1855) 55

Encyclopedia Americana (1854) 9,55-57

Encyclopedia Britannica (1878) ... 59-60

Encyclopedia Britannica (1910) ... 94

Encyclopedia Britannica (1963) ... 93,95-96,98

Encyclopedia Brittanica (1986) ... 94,98

Page

Funk and Wagnalls New College Standard Dictionary (1947) .. 65

Samuel Johnson, Dictionary of the English Language (1768) . 51

New American Cyclopaedia (1858-63) 57-59,90-91

Odhams Dictionary of the English Language (1946) 65

Oxford American Dictionary (1980) 66

Oxford English Dictionary (1933) 53

E. Partridge, Origins: A Short Etymological Dictionary of Modern English (1966) 65

E.D. Price, the British Empire Dictionary of the English Language (c. 1899) 64

Random House Dictionary of the English Language: the Unabridged Edition (1966) ... 66

A. Reid, A Dictionary of the English Language (1846) 55

W. Skeat, An Etymological Dictionary of the English Language (1910) 64

Page

D. Smalley, The American Phoenetic Dictionary of the English Language (1855) 54,55

Thorndike Century Senior Dictionary (1941) 65,66

Thorndike - Barnhart Comprehensive Desk Dictionary (1955) 65

N. Webster, An American Dictionary of the English Language (1830) 52,53

Webster's Collegiate Dictionary (1916)..... 63-64

Webster's Ninth New Collegiate Dictionary (1985) 65,66

Webster's Second New International Dictionary (1956) 67,68

Webster's Seventh New International Dictionary (1963) 66

Webster's Third New International Dictionary (1981) 67-68

[Webster] William Wheeler, Dictionary of the English Language (1876) 54,55

Page

E. Weekley, An Etymological Dictionary of Modern English (1921) 64

Winston Simplified Dictionary (1919) 64

J. Worcester, A Universal and Critical Dictionary of the English Language (1846) . 54,55

H. Wyld, Universal Dictionary of the English Language (1932) 64

Books:

M. Banton and J. Harwood, The Race Concept (1975) 71

R.A. Billington, The Protestant Crusade 1800 - 1860: A Study of the Origins of American Nativism (1963) . 81

I.F. Blumenbach, Elements of Natural History (1825) 93

F.L. Burdette, The Republican Party: A Short History (2d ed. 1972) 82

S.C. Busey, Immigration: Its Evils and Consequences (1856) 10,80

Page

H.J. Desmond, The Know Nothing Party (1904) 81

J.B. James, The Framing of the Fourteenth Amendment (1908) . 82

A. Montague, The Concept of Race (1964) 71

A. Montague, Man's Most Dangerous Myth: The Fallacy of Race (1942) 72

S.G. Morton, Types of Mankind (1854) 90

A. Tennyson, Poems (1853) 52

M.E. Thomas, Nativism in the Old Northwest, 1850-60 (1936) 81,82

Miscellaneous Materials:

Annual Report of the Commissioner - General of Immigration: 1899 16,17

Annual Report of the Commissioner - General of Immigration: 1906 18

Bureau of the Census, Fifteenth Annual Census of the United States, 1930, v. iii (1932) 34

Page

Immigration and Naturalization Service, Monthly Bulletin, v.1, no.4, (October, 1943) .. 33

Brief in Opposition, No. 406, October Term, 1953 36

Brief for Petitioner, No. 406, October Term, 1953 35

Brief for United States, Wadia v. United States, 101 F.2d 7 (2d Cir. 1939) 31

Note, Aliens' Right to Work: State and Federal Discrimination, 45 Fordham L. Rev. 835 (1977) 15

O'Connor, Constitutional Protection of the Alien's Right to Work, 18 N.Y.U.L.Q. Rev. 483 (1941) 15

No. 85-2169

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

SAINT FRANCIS COLLEGE, et al.,

Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI,
a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent is a naturalized American citizen born in Iraq of Arab ancestry. Respondent came to the United States more than two decades ago to complete his education; he received his bachelor's

degree from Cornell University and his Ph. D. from the University of Wisconsin. Respondent was hired in 1971 as a member of the faculty of St. Francis College, and taught in the Sociology Department until 1979. In 1977 the Sociology Department unanimously recommended that respondent be awarded tenure; according to the complaint, in every other case in the history of the school such a unanimous departmental recommendation had been accepted by the college. (J. App. 63). However, the complaint also alleged that as of 1978 St. Francis had never awarded tenure to any faculty member of non-European ancestry. (J. App. 63).

On February 10, 1978 the college's tenure committee, ignoring the views of respondent's own colleagues, urged that St. Francis College deny respondent

tenure; later that month the college's board of trustees voted to deny respondent tenure. Respondent requested that this decision be reconsidered, and in September 1978 the faculty senate voted to authorize the faculty affairs committee to review the recommendation of the tenure committee. The faculty affairs committee in January, 1979, recommended that the faculty senate request reconsideration of the tenure decision, and the senate did so. On February 6, 1979, however, the tenure committee met and decided not to reconsider respondent's application for tenure. (Pet. App. 2a-3a).

During 1978 and early 1979 respondent contacted the Pennsylvania Human Relations Commission ("PHRC") and attempted to file a complaint of

discrimination. Although respondent provided the Commission with written material documenting his allegation, PHRC expressly refused to formally "docket" any complaint. Prior to 1980 it was PHRC's express policy to refuse to process a complaint based on a denial of tenure until the complainant had ceased working for the school involved. (Pet. App. 3a-5a). On May 26, 1979, respondent's employment by St. Francis college ended; 24 days later respondent duly filed a charge with PHRC. On May 19, 1980, however, PHRC dismissed respondent's 1979 complaint as untimely, holding that he should have filed his charge in 1978, when PHRC itself had forbidden respondent to do so. (Pet. App. 3a-4a). PHRC's decision was squarely contrary to then prevailing

third circuit law, which held that the Title VII limitations period began to run, not when an employee was denied tenure, but only when the employee ceased working for his or her employer. Ricks v. Delaware State College, 605 F.2d 7710 (3d Cir. 1979), rev'd. 449 U.S. 250 (December 15, 1980).

Following dismissal of his charge by PHRC, respondent obtained an EEOC right to sue letter, and commenced this action on October 30, 1980. Six weeks later this Court decided Delaware State College v. Ricks, holding that the discriminatory act in a case such as this is the final decision to deny tenure. 449 U.S. at 256-59. The district court, applying in Ricks retrospectively, dismissed the Title VII claim as untimely. (Pet. App.. 51a-55a). The court of appeals affirmed,

agreeing that Ricks should be applied retroactively. (Pet. App. 9a-12a).

Respondent also asserted a claim under 42 U.S.C. § 1981. The original pro se complaint, and subsequent amended complaints, asserted inter alia that respondent had been discriminated against because of his ancestry, Arabian, and his national origin, Iraqi. One of the complaints alleged that respondent had been denied tenure because of his " race (Arabian)." (J. App. 16, 22, 51). The district court dismissed the complaint, holding that section 1981 does not forbid discrimination on the basis of ancestry. (Pet. App. 37a-39a). The court of appeals reversed, holding that section 1981 forbids discrimination against any "group that is ethnically and physiognomically distinctive." (Pet.

App. 24a). The court of appeals also declined to apply retroactively Wilson v. Garcia, 85 L.Ed.2d 254 (1985) reasoning that respondent had been entitled prior to Wilson to rely on "absolutely clear" circuit precedent establishing a longer period of limitations than is appropriate under Wilson. (Pet. App. 15a-16a).

SUMMARY OF ARGUMENT

I. The interpretation of section 1981 must take into account the ease with which racial concepts can be manipulated to reflect popular prejudices. For most of the first half of this century the United States government insisted that Arabs were not "white". The Justice Department urged that "the average man in the street would find no difficulty in assigning to the yellow race a ... Syrian with as much

ease as he would bestow the designation on a Chinaman or a Korean." In re Halladjian, 174 F. 834, 838 (1909). This Court upheld that approach, insisting that the "whites" eligible for naturalization under federal law were generally limited to Europeans. United States v. Thind, 261 U.S. 204 (1923). Lower court decisions applying Thind refused to permit naturalization of Arabs because in part of their "dark skin." In re Ahmed Hassan, 48 F. Supp. 843, 845 (E.D.Mich. 1942).

II. Section 1981, like the Fourteenth Amendment, prohibits discrimination on the basis of ancestry. Discrimination on the basis of ancestry is racial discrimination within the meaning of the Equal Protection Clause. Hirabayashi v. United States, 320 U.S.

81, 100 (1943). Section 1981 presumptively prohibits the same types of discrimination forbidden by the Fourteenth Amendment. Hurd v. Hodge, 334 U.S. 24 (1948).

A review of 50 English dictionaries printed between 1750 and 1985 demonstrates that in 1866 "race" meant "ancestry" or "ethnic group." This usage is clearly reflected in mid-nineteenth century publications. The 1854 Encyclopedia Americana, for example, characterized Arabs, Bedouins, Berbers, Hebrews, Tartars, Finns, and gypsies all as distinct races. (See pp. 55-57, infra). Members of the thirty-ninth Congress, which adopted the 1866 Civil Rights Act, referred variously to "the Scandinavian races," "the Chinese race," "the Latin races," "the Spanish race" and

the "Anglo-Saxon race." (See pp. 73-76, infra).

The 1866 Civil Rights Act was adopted in part to prohibit the sort of discrimination on the basis of ancestry which had been expressly advocated in the 1850's by the Know Nothing Party. One prominent Know Nothing tract denounced the Germans and Irish as "degenerated races" unfit to live with native Americans. S. Busey, Immigration: Its Evils and Consequences, p. 23, 39, 42 (1855). In response to such proposals, Senator Shellabarger emphasized that the 1866 Act would forbid discrimination against "the German race." Cong. Globe, 39th Cong., 1st Sess., 1294.

Petitioners argument that "Caucasians" are not "protected persons" presents insurmountable practical

problems. (Pet. Br. 16, 28). By 1866 ethnologists propounded a dozen different theories regarding the appropriate definition of Caucasian; under most classification systems neither Jews nor Arabs were then classified as Caucasian. The proposed definition of Caucasian has varied widely over the last 120 years; at the turn of the century, for example, Finns, Turks and Lapps were all regarded as orientals. It is inconceivable that the scope of the protections established by section 1981 shift with such changes in ethnological thinking.

III. Wilson v. Garcia, 85 L.Ed.2d 254 (1985), held that the appropriate limitations period for a section 1983 action should be that established by state law for an action for damages for personal injuries. In Pennsylvania that

limitation period is two years. This Court has granted certiorari to decide whether the limitations rule in a section 1981 case should be based on the limitation period applicable to a personal injury action, or to an action in contract. Goodman v. Lukens Steel Co., No. 85-1626.

However Goodman may be resolved, it should not be applied retroactively to the instant case. As the court of appeals observed, when the instant case arose it was "absolutely clear" under third circuit decisions that a section 1981 action was subject to a six year period of limitations in Pennsylvania. (Pet. App. 15a-16a). A circuit court's reading of its own past decisions is entitled to considerable deference. The minor changes that occurred in the

Pennsylvania statutes in 1978 did not vitiate the precedental significance of the third circuit's decisions.

ARGUMENT

I. THE HISTORY OF FEDERAL TREATMENT OF INDIVIDUALS OF NON-EUROPEAN ANCESTRY

The interpretation of section 1981, like that of the Equal Protection Clause, must take into account the ease with which racial concepts have in the past been manipulated to fit the prejudices of the day, and the danger that such changes could occur again. Over the course of modern history the problems of racial discrimination have been inextricably interrelated with shifting popular theories as to which groups constitute distinct races. Today few Americans would, out of either insensitivity or ill will, describe Arabs or Jews as a "race,"

or suggest that either group is somehow distinct from the "white race." But it was not always so.

Sixty-four years ago this Court ruled unanimously that a Caucasian native of the continent of Asia was, as a matter of federal law, not "white," and was thus absolutely ineligible for naturalization as a United States citizen, solely because his ancestry was Asian rather than European. United States v. Thind, 261 U.S. 204 (1923). Although the individual declared non-white in that case was an Asian Indian, both the Department of Justice and the lower courts interpreted Thind to mean that any Arab born in Asia was also as a matter of federal law non-white. An Arab or Indian excluded from naturalization by Thind was subject as a consequence to a host of

discriminatory state statutes, including laws barring such individuals from many public and private jobs, and from practicing a number of professions.[1] In the instant case petitioners urge this Court to rule that employment discrimination against Asian Indians, Arabs and others is permitted by section 1981, and to ground that result on a holding that Arabs, Indians, and other non-European "Caucasians" are now, as a matter of federal law, to be declared to be officially "white."

The decision in Thind, and the Justice Department racial theories which Thind endorsed and perpetuated, had their roots in the virulent hostility that

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[1] See Note, Aliens' Right to Work: State and Federal Discrimination, 45 Fordham L.Rev. 835 (1977); O'Conner, Constitutional Protection of the Alien's Right to Work, 18 N.Y.U.L.Q. Rev. 483 (1941).

emerged at the turn of the century towards the waves of immigrants then arriving from southern Asia, northern Africa, and central and southern Europe. In 1899 the reports of the Bureau of Immigration began to list new immigrants by "race" as well as nationality; the Bureau explained that

> [A]n Englishman does not lose his race characteristics by coming from South Africa, a German his by coming from France, or a Hebrew his, though he come from any country on the globe.[2]

The 1899 report classified immigrants into 49 races, including "Syrian" and "Hebrew." Hispanics were divided into six races; "Spanish," "Cuban," "Mexican," "South American," "Central American" and "West Indian," and Italians were divided

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[2] Annual Report of the Commissioner-General of Immigration: 1899, 5.

into two races "Italian (northern)" and "Italian (southern)."[3] This official list of races remained in use by federal immigration authorities for over 35 years, with the intermittent addition of additional races, including "Arabian" and "Spanish-American." (See Appendices A and B). In 1904 the Bureau of Immigration promulgated an official ethnological theory, dividing these 49 races into six "well-recognized divisions;" the Syrian race was placed in the Iberic division together with the Spanish and South Italian races, the Hebrew race was part of the Slavic division together with most eastern European races, and the North Italian race was classified in the Celtic division, which included the Irish and

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[3] Id. 6-7.

French races (See Appendix C). In 1906 the Bureau called attention to a "startling" shift in the sources of immigration away from northern European nations "inhabited by races nearly akin to our own;" southern and eastern Europe and Asia Minor, the Bureau warned, were the "racial sources [from which] the blood is drawn that is being constantly injected into the veins of our own race."[4]

In 1911 an Immigration Commission established by Congress issued an exhaustive report on the character of the new "races" of immigrants from central and southern Europe and asiatic Turkey. It concluded

The new immigration as a class is

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[4] Annual Report of the Commissioner-General of Immigration: 1906, 5.

> far less intelligent than the old ... Racially they are for the most part essentially unlike the British, German, and other peoples who came here during the period prior to 1880, and generally speaking they are actuated in coming by different ideals...[5]

The Commission recommend the imposition of a "limitation of the number of each race arriving each year to a certain percentage of the average of that race arriving during a given period of years." The Commission also urged that the immigration of undesirable races be curbed by adoption of a literacy requirement, explaining there were six races of immigrants half or more of whom could be turned away by means of this test, including the "Syrian," "Mexican," and "South Italian" races.[6] The

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[5] Sen. Doc. No. 747, 61st Cong., 1st Sess., 14 (1911).

[6] Id. 47, 99.

Commission published a separate volume describing in detail the racial characteristics of over 600 different races, explaining, for example, that members of the North Italian race were "cool, deliberate, patient, practicable, and ... capable of great progress," while the South Italian race, "closely related to be Iberians of Spain and the Berbers of northern Africa," and possibly with "traces of African blood," was "excitable, ... impulsive, highly imaginative, impracticable, having little adaptability to highly organized society." [7]

The Commission's avowedly racial proposals soon became law. In 1917 a literacy test was enacted for the avowed

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[7] Sen. Doc. No. 662, 61st Cong. 3d Sess., 82 (1911).

purpose of excluding undesirable "races".[8]

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[8] The 1916 House Report, expressly relying on the 1911 Commission Report, explained that the literacy test was designed in particular to stem immigration by southern and eastern Europeans, particularly Italians, who it described as prone to "crimes of personal violence." H.R. No. 95, 64th Cong., 1st Sess., 4-5 (1916). Speaking in favor of the literacy requirement, Representative McKenzie explained that the newer immigrants were unlike the earlier "Anglo-Saxon, Celtic, and Germanic ... races":

> "The congenial assimilation of races so different in temperament and traditions as those of southern Europe and oriental countries with the races of northern and western Europe is a practical impossibility."

53 Cong. Rec. 4776-77 (1916). See also id. at 4783 (remarks of Rep. Hood) (citing Immigration Commission's racial views) 4789 (remarks of Rep. Vinson) (emphasizing "the difference between the north and south Italians"), 4796 (remarks of Rep. Wilson) (literacy test needed to end immigration of illiterate "European ... races"), 4806 (remarks of Rep. Focht) (favors admission of "the Jew, the Armenian, and the Dago, and any other

(continued...)

39 Stat. 877. The 1917 act also created what came to be called the "Asiatic Precluded Zone," forbidding any immigration whatever from the Moslem regions of Asian Russia and part of the Arabian peninsula, as well as from Indo-China and the Indian subcontinent. 39 Stat. 876. Immigration quotas largely excluding non-Europeans were enacted in 1924. 43 Stat. 159.

The same racial views that shaped federal policy towards future immigration also affected federal treatment of immigrants who had already reached our shores. The vehicle for the latter policy was section 2169 of the Revised

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[8](...continued)
race" only if literate), 4810-11 (literacy of immigrant "races," including Syrian, etc.), 4881-3 (remarks of Rep. Chandler) criticizing racial purpose of literacy test).

Statutes, which provided that the procedures for naturalization were open only to "aliens being free white persons and to aliens of African nativity and to persons of African descent."[9] Beginning in 1909, the Department of Justice initiated an aggressive campaign to utilize section 2169 to prevent the naturalization of immigrants from southern and western Asia. Between 1909 and 1923 a majority of the reported section 2169 cases involving non-Oriental Asians were directed at preventing the naturalization of Syrian Arabs.[10]

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[9] See 1 Stat. 103, 16 Stat. 256.

[10] In re Balsara, 171 F. 294 (S.D.N.Y. 1909) (Indian; dicta forbidding naturalization of Arabs); In re Najour, 174 F. 735 (N.D.Ga. 1909) (Syrian Arab); In re Halladjian, 174 F. 834, 844 (D. Mass. 1909) (Armenian; noting the existence of three unreported cases involving Arabs); In re Mudarri, 176 F.

(continued...)

The Justice Department's extraordinary racial theories were quoted at length in In re Halladjian, 174 F. 834 (D.Mass. 1909). According to the government, the non-Negro peoples were divided into two races, the white or European race, and the "Asiatic or yellow race." 174 F. at 837-38. "European, or its analogous term white," the Department argued, referred

> not merely to the local habitat of the person to who it applied, but ... [to] the prevailing ideals, standards, and aspirations of the people of Europe. 174 F. at 837.

The "Asiatic or yellow race," included

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[10](...continued)
465 (D.Mass. 1910) (Syrian Arab); In re Ellis, 179 F. 1002 (D.Ore. 1910) (Syrian Arab); In re Shahid, 205 F. 812 (E.D.S.C. 1913) (Syrian Arab); In re Mozumdar, 207 F. 115 (E.D. Wash. 1913) (Indian); Ex parte Dow, 211 F. 486 (E.D.S.C. 1914), 213 F. 355 (E.D.S.C. 1914) (Syrian Arab); In re Singh, 246 F. 496 (E.D.Pa. 1917) (Indian); In re Singh, 257 F.2d 209 (S.D.Cal. 1919) (Indian).

"substantially all the aboriginal peoples of Asia." 174 F. at 838. The racial identity of particular individuals, according to the government, was self-evident to ordinary citizens:

> [T]he average man in the street ... would find no difficulty in assigning to the yellow race a Turk or Syrian with as much ease as he would bestow the designation on a Chinaman or a Korean. 174 F. at 838.

Asian Indians were to be excluded from naturalization, the United States contended, "because many Englishmen treat them with contempt and call them 'niggers.'" 174 F. at 838. The Justice Department apparently agreed that the Jewish people, like Turks or Syrians, had their origins in Asia, but insisted that Jews were "white" because they had "become westernized and readily adaptable to European standards." 174 F. at 841.

The federal decisions holding that Arabs were not white relied primarily on the fact that their native Syria had in earlier times been occupied by the Mongols, and more recently by the Turks, who were then generally regarded as an oriental race.[11] Syrians were said to have a complexion with "a yellow tinge more characteristic of the Turk and Mongol than the olive of southern Europe." In re Dow, 213 F. at 362. While it was possible that some Arabs of the region had no such oriental blood, the court in Dow emphasized that "[t]here is no known ocular, microscopic, Philological, ethnological, physiological, or historical test that can settle the race

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[11] In re Shahid, 205 F. 812, 816 (E.D.S.C. 1913); In re Dow, 213 F. 355, 361-62 (E.D.S.C. 1914); see also In re Balsara, 171 F. 294, 295 (S.D.N.Y. 1909).

of the modern Syrian." 213 F. at 362. The Syrian petitioner in Dow argued in vain that Arabs were members of the same Semitic family as Jews, whose eligibility for naturalization had not been questioned. The court reasoned:

> The European Jew has become racially, physiologically ,and psychologically a part of the peoples he lives among .... [N]o one can tell how much so-called Aryan blood runs in the veins of the modern European Jew.... The Jew of Northern Germany and Northern Russian is frequently blue eyed and fair haired.... But there are communities professing the Jewish religion in Northern Africa and the east who are as dark as Negroes or the peoples among whom they live, and who probably by intermixture of blood are physiologically the same. The European Jew is as white as the peoples among whom he lives and the African or Asiatic Jew as dark.... A professing Jew from Syria who was not of European nativity or descent would be as equally an Asiatic as the present applicant, and as such not within the terms of the statute.

213 F. at 363.

Prior to Thind, however, the Justice

Department's litigation campaign was largely unsuccessful. The decision in Dow was reversed on appeal,[12] and the government prevailed in only two of the reported cases in which it opposed the naturalization of a non-oriental Asian.[13] But Thind largely sustained the government's interpretation of section 2169 and expressly spurned the suggestion of the lower courts that all "Caucasians" be deemed legally "white." 261 U.S. at 208-11. There was, this Court reasoned, an obvious "racial difference" between Hindus and European whites; white Americans would react with "astonishment" to any suggestion they belonged to the

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12 Dow v. United States, 226 F. 145 (4th Cir. 1910).

13 In re Shahid and In re Singh (E.D.pa. 1917), supra.

same race as Indians, Polynesians, or "the Hamites of north Africa,"[14] whose complexion ranged "from brown to black." 261 U.S. at 211, 215. Although the original "Aryan" invaders of India may have been fair skinned, they had failed "to preserve their racial purity" because "the rules of caste ... seem not to have been entirely successful." 261 U.S. at 213.

Thind concluded that Congress had intended to limit the privilege of American citizenship to the white peoples of Europe -- "bone of their bone and flesh of their flesh." 261 U.S. at 213. A decade later this Court explained that under Thind "men are not white if the strain of colored blood in them is a half

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[14] The Hamites are Arab inhabitants of northern Africa.

or a quarter, or, not improbably, even less ... Cf. the decisions in the days of slavery." Morrison v. California, 291 U.S. 82, 86 (1934). Morrison noted that, because of the "strain of Indian blood in many of the inhabitants of Mexico as well as in the peoples of Central and South America," it was an "unsettled question" whether Mexican immigrants were legally white and thus eligible for naturalization. 291 U.S. at 96 n. 5. Few decisions of this Court since Dred Scott v. Sanford, 60 U.S. 19 (1857) have been as overtly racial in their reasoning or conclusion.

Not content with having won in Thind a prohibition against future naturalization of non-European immigrants, the Justice Department after 1923 embarked on a campaign to

denaturalize Indians, Arabs and Armenians who had been formally naturalized as much as 12 years earlier. Those singled out for this vindictive action included the chief research engineer of the General Electric Corporation and an affluent California attorney with a Ph. D.[15] The Justice Department insisted, usually with success, that Thind had held "that Asiatics generally ... were excluded as racial groups, regardless of the origin of their foundation stock or the speculations of ethnologists."[16] Relying

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[15] United States v. Gokhale, 26 F. 2d 360 (2d Cir. 1928); United States v. Pandit, 15 F.2d 285 (9th Cir. 1926); see also United States v. Cartozian, 6 F.2d 919 (D.Ore. 1925); United States v. Ali, 7 F.2d 728 (E.D.Mich. 1929), 20 F.2d 998 (E.D.Mich. 1927); United States v. Khan, 1 F.2d 1006 (W.D.Pa. 1924); Mozumdar v. United States, 299 F. 240 (9th Cir. 1924).

[16] Brief for United States, Wadia v. United States, 101 F.2d 7 (2d Cir. 1939), p. 6.

on Thind, several lower court cases held that Arabs as a class were not white and were therefore ineligible for naturalization:

> Apart from the dark skin of the Arabs, it is well known that they are a part of the Mohammedan world and that a wide gulf separates their culture from that of the predominantly Christian peoples of Europe. It cannot be expected that they would readily intermarry with our population and be assimilated into our civilization.... Arabia, moreover, is not immediately contiguous to Europe or even to the Mediterranean..[17]

It was not until after the outbreak of World War II that the Immigration and Naturalization Service, noting that then recent events had made "disastrously apparent" "the evil results of race discrimination," ruled that Arabs were

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[17] In re Ahmed Hassan, 48 F. Supp. 843, 845 (E.D.Mich. 1942); see also United States v. Ali, 7 F.2d 728, 732 (E.D.Mich. 1925) (emphasizing that skin of Arab involved was "unmistakably dark").

legally "white," at least if they came from areas outside the Asian Precluded Zone.[18]

The position now advanced by petitioners is of course precisely the opposite of the ruling in Thind, but petitioners' arguments and reasoning of Thind are entirely consistent in demonstrating the ease with which racial myths and categories can be manipulated to legitimize purposeful discrimination. This Court has refused in the past to permit such manipulation to eviscerate the principle of non-discrimiation. Texas authorities for over a century regarded Mexican-Americans as a distinct

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[18] Immigration and Naturalization Service, Monthly Bulletin, v. 1, No. 4, pp. 12-16 (October 1943). The underlying statute was finally repealed in 1952. 66 Stat. 239.

and inferior race;[19] state forms asked individuals to list their races as "white," "negro," or "Mexican,", Mexican-Americans were directed by state officials to use public facilities for blacks rather than those for whites, Mexican-American children were required to attend separate segregated schools, and Mexican-Americans were largely

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[19] Officials of other states also regarded Mexican-Americans as a distinct race. See, e.g., State v. Martinez, 673 P.2d 441, 443, 105 Idaho 841 (1983); Riggin v. Dockweiler, 104 P.2d 367, 367, 15 Cal.2d 651 (1940); State v. Quigg, 155 Mont. 119, 147, 467 P.2d 692 (1970); Herrera v. People, 87 Colo. 360, 361, 287 P.2d 643 (1930); Flores v.. McCoy, 186 Cal. App.. 2d 502, 504, 9 Cal.Rptr. 349 (1960). See also 53 Cong. Rec. 4846 (remarks of Rep. Slayden) ("Down in the Southwestern states ... we employ the word 'Mexican' to define a race rather than a nationality.") (1916); U.S. Department of Commerce, Bureau of the Census, Fifteenth Census of the United States, 1930, v.iii, parts 1 and 2 (1932) (data on "Mexican race").

excluded from participation on juries.[20] When the constitutionality of the latter practice was challenged, however, the Texas courts held, and the Attorney General of that state argued in this Court, that deliberate state discrimination against Mexican-Americans was entirely permissible because, they asserted, the state's invidious racial theories were simply mistaken; Mexican-Americans, counsel for the state argued, could be discriminated against because, contrary to the belief which pervaded all aspects of Texas policy, members of that minority were "not a separate race" but merely "white people of Spanish

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[20] Hernandez v. Texas, 347 U.S. 475, 479-80, 479 n. 9 (1954); Brief for Petitioner, No. 406, October Term, 1953, pp. 13, 37-41.

descent."[21] In Hernandez v. Texas, 347 U.S. 475 (1954), this Court unanimously rejected that brazen defense, and it should do so again in the instant case.

II. SECTION 1981 PROHIBITS DISCRIMINATION ON THE BASIS OF ANCESTRY

A. Introduction

The central substantive problem presented by this appeal is to determine what the thirty-ninth Congress meant by discrimination on the basis of "race". The original language of section 1 of the 1866 Civil Rights Act provided that "there shall be no discrimination in civil rights or immunities ... on account of race." 14 Stat. 27. Senator Trumbull, in introducing the bill ultimately enacted in 1866, described it as a

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[21] Hernandez v. State, 251 S.W. 2d 531, 535 (Tex. Crim. App. 1952); Brief in Opposition, No. 406, October Term, 1953, p. 12.

measure to protect "every race and color". Cong. Globe, 39th Cong., 1st Sess. 211 (1866). The legislative history of the act is replete with references to "race" as the prohibited basis of discrimination. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 287-96 (1976).

Petitioners contend that the term "race" in the 1866 Civil Rights Act, and in the congressional debates of that year, should be construed in the manner in which that word would be used by a late twentieth century ethnologist -- to refer to the 4 or 5 major divisions of mankind currently recognized by scientists, i.e., caucasian, black, oriental, and American Indian.[22] The

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[22]This narrow reading of section 1981 of the 1866 Act is necessarily (continued...)

third circuit rejected that reading of the language and history of section 1981, reasoning that the framers of the 1866 Act did not use the term"'race' ... in a crabbed fashion or to signify only those races identified by anthropologists as distinct." (Pet. App. 22a). We believe that the court of appeals was correct; we maintain that the term "race" was understood by the framers of the 1866 Civil Rights Act to refer to an individual's ancestry, the ethnic group to which he or she belongs.

Our contention that section 1981 forbids discrimination on the basis of ancestry is not controlled by the

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[22](...continued)
inconsistent with this Court's decision in Takahashi v. Fish and Game Commission, 334 U.S. 410, 420 (1948), that section 1981 prohibits discrimination on the basis of alienage.

conflicting dicta in this Court's past decisions regarding whether section 1981 prohibits discrimination on the basis of national origin.[23] An individual's ancestry, the ethnic group from which he and his ancestors are descended, is not necessarily the same as that individual's national origin, the country from which the individual or his forbearers

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[23] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968), asserts in dicta that section 1982 does not forbid discrimination on the basis of national origin. In Yick Wo v. Hopkins, 1218 U.S. 356 (1886), on the other hand, the Court observed that the Fourteenth Amendment prohibited discrimination on the basis of race, color, or nationality, and that "[i]t is accordingly enacted ... that 'All persons within the jurisdiction of the United States shall have the same right to make and enforce contracts ...,'" quoting section 1981. 118 U.S. at 369 (emphasis added). See also United States v. Wong Kim Ark, 169 U.S. 649, 695-96 (1898). Most recently Delaware State College v. Ricks, 449 U.S. 250, 256 n. 6 (1980), regarded the issue as an open question.

emigrated to the United States. Although an individual's ancestry and national origin are in some instances identical, as in the case of a Greek from Greece, that often is not the case. Some distinct groups, such as Arabs, Jews, and gypsies, have lived in and emigrated to the United States from a large number of different countries. Other groups, such as the Welsh or the Basques, constituted a distinct minority within their native lands, and were not in modern times part of a distinct Welsh or Basque nation. Even where an ethnic group constitutes the primary stock of one country, members of the same group may also be native to other nations; there are indigenous Hungarians in Rumania and Irishmen in the United Kingdom. Thus an employer which had no policy of discriminating on the

basis of national origin against immigrants from the United Kingdom could conceivably discriminate on the basis of ancestry against an Irishman from Belfast, a Jew from London, or a Welshman from Cardiff. In the instant case the district court expressly noted that respondent's national origin, Iraqi, was different than his ancestry, Arabian. (Pet. App. 38a).

Nor is our proposed construction of section 1981 precluded simply because of the existence of Title VII. Petitioners, although conceding as they must that Title VII did not repeal section 1981 in its entirety, urge that section 1981 should be construed narrowly in light of the availability of other remedies under Title VII. (Pet. Br. 20-21, 39-40). But to interpret section 1981 in a more

constricted manner than would have been appropriate had Title VII not been enacted would be to violate the express intent of Congres "that the two procedures augment each other and ... not [be] mutually exclusive." Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975). Section 1981 provides a number of important remedies and procedures not available under Title VII. First, the retrospective relief provided to a complainant in a section 1981 action is not limited to equitable back pay, but includes both actual and punitive damages. Johnson v. Railway Express Agency, 421 U.S. at 460. Second, although both Title VII and section 1981 prohibit racial harassment of an employee, Title VII provides no monetary remedy for a harassed employee who lost

no income as a consequence of that discrimination; the only monetary redress available for any mental suffering in such a case must come under section 1981. Third, in a section 1981 action for compensatory relief, unlike a Title VII for back pay action, the plaintiff would be entitled to a jury trial; if the plaintiff seeks relief under both section 1981 and Title VII for the same alleged discrimination, the Seventh Amendment requires the trial judge adjudicating the Title VII claim to defer to the liability findings of the jury in the section 1981 action. Beacon Theatres v. Westover, 359 U.S. 500 (1959).

If, as we urge, the section 1981 prohibition against racial discrimination encompasses a ban on discrimination on the basis of ancestry, dismissal of

respondent's claim was necessarily improper. The district court expressly and correctly acknowledged that respondent had claimed that he had been discriminated against because of his Arab ancestry. (Pet. App. 38a). Similarly, the anti-Semitic incident in Shaare Tefila was manifestly based on the Jewish ancestry of the individual petitioners and other members of the petitioners' synagogue, rather than on their religious views. As one amicus has observed, most anti-Semitism during the last century has been based on the ancestry and purported "racial" character of the Jewish people[24]

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[24] See also Mayers v. Ridley, 465 F.2d 630, 631 n.1 (D.C. Cir. 1972) (en banc) (quoting restrictive covenant forbidding sale or lease of property "to any person of the Semitic race, blood or origin, which racial description shall be deemed to include Armenians, Jews, Hebrews, Persians and Syrians....)

rather than on theological differences with the religious tenets of Judaism.[25]

We ground our proposed interpretation of section 1981 on four distinct arguments. First, we urge that because the Fourteenth Amendment prohibits discrimination on the basis of ancestry, the 1866 Civil Rights Act should be read in the same manner, since the Congress which adopted both measures understood them to contain similar prohibitions. (Pp. 46-49, infra). Second, we contend that during the nineteenth century "race" had a meaning similar to "ancestry" or "ethnic group" in modern English, and that Arabs and Jews, for example, were commonly referred to as races. (Pp. 50-73, infra). Third,

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[25] Brief Amicus Curiae of the Anti-Defamation League, etc., et al., p. 15.

we argue that the framers of section 1981 used the term "race" in this manner, and expressly intended that statute to prohibit discrimination by the Know Nothings against particular white ethnic groups, such as "the German race." (Pp. 73-88, infra). Finally, we suggest that the interpretation of section 1981 proposed by petitioners would be unworkable in practice. (Pp. 88-103, infra).

B. The 1866 Civil Rights Act and the Fourteenth Amendment

The non-discrimination principle embodied in the equal protection clause of the Fourteenth Amendment has never been tied to any technical ethnological meaning. This Court has repeatedly held that the equal protection clause forbids discrimination on the basis of

ancestry.[26] Hirabayashi v. United States, 320 U.S. 81 (1943), which first ruled that the Fourteenth Amendment forbids discrimination on account of ancestry, was expressly premised on the view that discrimination on the basis of ancestry constitutes racial discrimination within the meaning of the Fourteenth Amendment:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrrimination based on race alone has often been held to be a denial of equal protection. 320 U.S. at 100. (Emphasis added).

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[26] Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (discrimination on the basis of "ethnic criteria"); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (discrimination on the basis of "ancestry"); Oyama v. California, 332 U.S. 633, 646 (1948) (discrimination on the basis of "ancestry"); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

If, as Hirabayashi reasoned, the "racial" discrimination prohibited by the Fourteenth Amendment encompasses discrimination on the basis of ancestry, it would be surprising indeed if the 1866 Civil Rights Act's similar prohibition against racial discrimination, enacted less than three months before Congress approved the Fourteenth Amendment, had any different meaning. The fact that the Fourteenth Amendment itself prohibits discrimination on the basis of ancestry is weighty evidence that the 1866 Civil Rights Act does so as well:

> In considering ... the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purpose of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve... It is clear that in many significant

> respects the statute and the Amendment were expressions of the same general congressional policy.

Hurd v. Hodge, 334 U.S. 24, 32 (1948). The thirty-ninth Congress adopted the Fourteenth Amendment in part to assure that the Civil Rights Act's prohibition against government discrimination could not be repealed by a simple majority of a later Congress. Section one of the Amendment, Representative Thayer noted, was "but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become law."[27]

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[27] Cong Globe, 39th Cong., 1st Sess., 2465 (1866).

B. The Etymology of the Word "Race"

When Congress frames a statute with words which enjoy a meaning familiar and intelligible to ordinary members of the public, the statute must be interpreted in light of that common understanding, not on the basis of some possibly different definition used by scientists. Maillard v. Lawrence, 54 U.S. (16 How.) 251, 261 (1853). The interpretation of statutes enacted a century or more ago requires particular caution, for the words chosen by Congress, like any other part of the English language, may have had a significantly different common meaning 50 or 100 years ago than they do today. The word "race" is a term whose meaning has indeed changed substantially over the course of the last 150 years. We set out in Appendix E the definitions

of "race" contained in 50 dictionaries published between 1750 and 1985.[28] As we explain at length below, this Appendix demonstrates that the term race has had three quite distinct meanings over that period of time -- in 1800 "race" meant "family", between roughly 1850 and 1950 "race" was generally understood to denote an individual's ancestry or ethnic background, and only in the last several decades has "race" been widely understood among laymen to refer to one of the 4 or 5 basic divisions of mankind. Prior to 1850 the primary meaning of "race" was family. Samuel Johnson's 1768 Dictionary of the English Language defines race as

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[28] A chronological list of the dictionaries cited is set forth in Appendix D. The brief citations which follow refer to the author or title and date of publication; the full citation can be found in that appendix.

"[a] family ascending ... [a] family descending ... a collective family." The first edition of Noah Webster's American Dictionary, published in 1830, defines race as "[t]he lineage of a family, or continued series of descendants from a parent who is called the stock." In Alfred Lord Tennyson's 1832 poem "Locksley Hall" the protagonist uses the term in this sense, declaring "I shall take some savage woman, and she shall rear my dusky race".[29] Consistent with this meaning, the most common definition of "kinsman" until early in the twentieth century was "man of the same race"; "kin," "kinfolk" and "kindred" were

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[29] A. Tennyson, Poems, 282 (1853). The reference appears to be to an Asian Indian woman; an earlier line refers to "Mahratta," (Maratha), a people and region of south central India. The protagonist of the poems is an Englishman.

similarly defined as referring to persons of "the same race". See Appendix F. "Race" was frequently given as a synonym for "family," "lineage," and "progeny." See Appendices G, H, I. "House", which at times still denotes a family ("The House of Windsor"), was also defined as a "race". See Appendix J.

The use of the term race to refer to an ethnic group dates from at least 1600[30], but it appears to have been relatively uncommon until the middle of the nineteenth century. The earliest instance in which any English language dictionary clearly utilized "race" in this sense appears to be the 1830 edition of Websters, which defines gypsies as "a

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[30]The Oxford English Dictionary cites references to "the British race" (c. 1600), the "Pigmean race" (1667), and "Troy's whole race" (1713). V. 8, p. 87 (1933).

race of vagabonds which infest Europe, Africa and Asia." Four other dictionaries published prior to 1850 also refer to gypsies as a "race", a usage which may well reflect the fact that the small bands of gypsies more closely resembled families than the large ethnic groups that would later be characterized as races. See Appendix K. The other ethnic group to be defined as a race prior to 1850 was the Semites.[31] American dictionaries published in 1846 and 1855 expanded the definition of "race" to include "ancestry" as well as "family,"[32] and the definition of race in the 1876 edition of Websters was altered to include a "tribe, people, or nation, believed or presumed to belong to the

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[31] Worcester (1846), p. 656.

[32] Id., p. 585; Smalley (1855) p. 381.

same stock."[33] After 1840 "race" also begins to appear as a synonym for words which clearly refer to groups larger than blood relatives, such as stock[34], tribe[35], and even nation[36].

The use of the term race to refer to an individual's ethnic background is clearly reflected in the encyclopedias of the era. The 1854 edition of the Encyclopedia Americana, for example, explained in a description of northern Africa:

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[33]Webster (1876), p. 589.

[34]Reid (1846), p. 391; Worcester (1846), p. 698; Bolles (1847), p. 715; Smalley (1855), p. 506.

[35]Reid (1846), p. 420; Worcester (1846), p. 754; Boag (1847), p. 1357; Craig (1849), p. 920; Smalley (1855), p. 571.

[36] Clark (1855), p. 255 (nation defined as "a great body of people born of the same race, as the English in England and America").

> The Arab natives are, for the most part, a wandering race, dwelling in tents ... Their business is war; their income is plunder.(V. 1, p. 563) (Emphasis added).

Amongst the Berbers, the encyclopedia explained, "[a]ll the branches of this race are distinguished by beards." (v.1, p. 563) (emphasis added). The Bedouins were "a numerous Mohammedan race, which dwells in the deserts of Arabia, Egypt and Northern Africa" (v. 2, p. 79) (emphasis added), and the Copts of Egypt were "evidently a distinct race" (v.3, p. 526) (emphasis added). The description of "Hebrews", although less perjorative than the discussion of Arabs, was equally racial:

> This singular people ... presents the wonderful spectacle of a race preserving its peculiarities of worship, doctrine, language and

> feelings in a dispersion of 1800 years over the whole globe.[37]

The Encyclopedia Americana also characterized as distinct races Finns, gypsies, "Hindoos", Basques, Sclavonians, Tatars, Georgians, and Samoiedes.[38]

The New American Cyclopaedia, published in the years 1858-63, refers to Arabs as a race in nine different entries,[39] and characterized the Arab peoples as comprised in turn of a number of subsidiary races:

> [T]he various races and tribes known collectively as Arabs comprise

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[37] V.6, p. 209 (emphasis added). Another passage characterized Jews as a race. V.11, p. 118.

[38] V.5, p. 123; v.6, pp. 123, 333-4; v.11, p. 118. "Samoiedes" appears to be a reference to the Samoyeds, a people inhabiting northeastern European Europe and northwestern Siberia.

[39] V.1, p. 739; v.2, p. 610; v.3, p. 158; v.5, p. 697; v.7, p. 34; v.9, p. 742; v. 13, p. 159; v. 15, pp. 603, 653.

> nearly seven-eights of the population [of Arabia]. Of the Arabs... the ... Bedouins are a wandering race, living in tents and moving in troops from place to place.[40]
>
> [T]he Berbers are an interesting race ... [r]ude, warlike, and nomadic.[41]
>
> [T]he Copts are beyond question the best representatives of the ancient Egyptian race[42].
>
> Druses ... [are] a race and a religious sect of Syria, chiefly in the southern ranges of Lebanon[43].

The Jews were described as "a people of the Semitic race".[44] The New American Cyclopaedia refers in all to more than 20

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[40] V.1, p. 739 (emphasis added).

[41] V.3, p. 158 (emphasis added).

[42] V.5, p. 697 (emphasis added).

[43] V.6, p. 630 (emphasis added).

[44] V. 9, p. 27; see also v.2, p. 610 (Jews one of the six races inhabiting the Barbary states), v.11, p. 742 (Jews one of the six races inhabiting Morocco), v.15, p. 603 (Jews one of the seven races inhabiting Tripoli).

different ethnic groups as constituting races, including Afghans, Celts, Danes, Swedes, Norwegians, Germans, Greeks, Italians, Wallachians, Magyars, Persians, Kurds, Spaniards, Portuguese, Russians, Turks, and Tatars.[45]

The 1878 American edition of the Encyclopedia Britannica also used "race" to refer to what we would now describe as ethnic groups:

> The origin of the Arab race ... can only be a matter of conjecture ... [T]he first certain fact is the ... division of the Arab race into two branches, the "Arab", or pure; and the "Mostareb", or adscititious.[46]
>
> BARBARY ... The name is derived from the Berbers, one of the most

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[45] V.1, p. 166; v.4, p. 638; v.6, p. 382; v.7, pp. 335-37, 655; v.9, p. 335-6; v.13, pp. 159-60, 506; v.14, pp. 225-26, 804; v.15, pp. 216, 264, 603, 653.

[46] V.2, p. 245 (emphasis added); see also v.1, p. 564.

remarkable races in the region.[47]

> The Druses are a mysterious people ... The mere fact that they possess a knowledge of the Celestial Empire in such contrast to the geographical ignorance of the other Syrian races is in itself remarkable ... the rise and progress of the religion which gives unity to the race can be stated with considerable precision.[48]

Jews were expressly referred to as a race, as were Afghans, Turks, Germans, Poles, Croatians, Servians, Danes, Finns, Germans, Hungarian, Greeks, Albanians, and the Persians.[49]

The definition of "race" urged by petitioners, denoting one of a small number of branches of mankind, does not appear in an English language dictionary

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[47] v.4, p. 363 (emphasis added); see also v.1, p. 564.

[48] v.7, p. 483

[49] v.1, pp. 236, 564; v.3, p. 118; v.7, p. 84; v.9, p. 216; v.10, p. 473; v.11, p. 83; v.12, p. 365; v.18, p. 627.

until the publication at the turn of the century[50] of the Century Dictionary and Cyclopedia. The eight volume Century Dictionary expressly distinguished three separate meanings of the word "race": (1) "[a] geneological line . . . . family; kindred;" (2) "[a] tribal or national stock ... as, the Celtic race; the Finnic race ...; the English, French and Spani[sh] ... races;" and (3) "a great division of mankind ... as, the Caucasian race."[51] The editors of the Century Dictionary made clear by their own use of words, however, that they regarded the second meaning as the most

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[50] Counsel for respondents were able to locate a 1911 edition of this multi-volume publication. There appears to have been an 1891 edition, but we have not been able to locate a copy ascertain its contents.

[51] V. 8, p. 4926 (emphasis in original)

widely used and accepted. Thus in other definitions the Century Dictionary refers to "[t]he English race," "the Arabic race," "the ancient Egyptian race or races," "the Irish race," "the Italian race," "the French race," "the Spanish race," "the German race," "the Hungarian race," "the Greek race," "the Finnic race," "the Slavic race," "the native race of India," "the races speaking Iranian languages," and "a race inhabiting Kafiristan."[52] A Moor was described as "[o]ne of a dark race dwelling in Barbary ... a mixed race, chiefly of Arab and Mauritanian origin", and "semitic" was defined as "pertaining to the Hebrew race or any of those

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[52] v. 1, p. 214; v. 3, pp. 1856, 1933; v. 4, pp. 2226, 2373, 2499, 2614, 2823; v. 5, pp. 2920, 3058, 3180, 3202, 3261; v. 8, pp. 5279, 5794.

kindred to it, as the Arabians...."[53]

The definition of race in the 1876 edition of Webster's, quoted earlier, remained essentially unchanged for 40 years. In 1916 the editors for the first time noted that the term had acquired a new scientific meaning in addition to the meaning understood by laymen. The additional entry read "6. Ethnol[ogy]. A division of mankind possessing constant traits, transmissible by descent, sufficient to characterize it as a distinct human type." But the editors themselves continued to use "race" in the popular sense of ethnic group. Thus an Iraq was defined as "[O]ne of the natives of Iraq, chiefly of the Arabic race", and a Hamite was defined as "[a] member of

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53 V. 6, p. 3852; v. 8, p. 5487.

the chief race of North Africa."[54] Among the definitions of "race" in the other dictionaries published between the turn of the century and 1940, four do not include division of mankind as an alternative meaning, two characterize that meaning as a use peculiar to ethnologists, and only one characterizes that meaning as found common parlance.[55] The editors of all of these dictionaries, moreover, continued themselves to use the word race to refer to ethnic groups.[56]

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[54] Webster (1916), pp. 450, 532; see also id. at 224 (Copt), 472 (Hindu), 510 (Indian), 740 (Persian).

[55] Price (c. 1899), 608 (no such meaning); Chambers (1908) 762(no such meaning); Skeat (1910) 494 (no such meaning); Winston (1919), 502 (an alternative meaning); Weekley (1921), 1190 (no such meaning); Universal (1932), 955 (ethnological term).

[56] See, e.g., Winston (1919) pp. 21, 28, 56, 135, 273, 342, 346, 502.

World War II marks the beginning of a decided shift in the common usage of the term race. Virtually all English dictionaries published after 1940 offer "division of mankind" as a possible meaning of "race", and in most instances this is a popular rather a scientific definition, although the earlier definition of race as "stock", "ancestry", or "ethnic group" remains.[57] Among dictionaries published during the 1940's, references to ethnic groups as "races" continue, but those groups are referred to with equal frequency as

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[57] Thorndike (1941), p. 751 (common meaning); Odham (1946), p. 862 (common meaning); Funk and Wagnalls (1947), p. 964 (common meaning); Thorndike-Barnhart (1955), p. 639 (common meaning); Random House (1966), p. 1184 (ethnology); Webster's (1985), p. 969 (common meaning); but see American College (1947), p. 997 (no such meaning); Origins (1966), p. 546 (no such meaning.

"peoples". The Thorndike Century Senior Dictionary (1941), for example, characterizes Semites, Hindus, Moors, Hamites and Berbers as distinct races, but describes the Jews as a "people", and gypsies as a "group".[58] Among dictionaries printed after 1960, ethnic groups are virtually never referred to by the editors themselves as races,[59] although the dictionaries recognize, within their definitions of "race," that such usage still occurs among the public.[60] This change in usage is

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[58] Pp. 44, 84, 417, 421, 441, 505, 603, 830.

[59] But see Webster's (1963), p. 289 (Copt defined as "an Egyptian of the native race"); Oxford American (1980), p. 617 (Semite defined as "a member of the group of races that includes the Jews and Arabs").

[60] Funk and Wagnalls (1963) p. 1038 (German race); Webster's (1985), p. 969

(continued...)

signaled most clearly in the differences in the definitions found in Webster's Second New International Dictionary, originally published in 1934 and reprinted as late as 1956, and Webster's Third New International Dictionary, first published in 1961. Webster's Second characterizes Arabs, Jews, Anglo-Saxons, Moors, Semites, Hamites, Hindus, and Indians each as distinct races; in Webster's Third the word "people" has been substituted for "race" in every one of those definitions.[61] The editors of

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[60](...continued)
(English race); Webster's (1971), p. 1870 (Anglo Saxon race, Jewish race).

[61] Webster's (1956), pp. 103, 136, 1334, 1591, 2276, 1130, 1180, 1309; Webster's (1971), pp. 84, 108, 1047, 1467, 2065, 1024, 1070, 1193. Webster's Second contains detailed lists of various "races" inhabiting Persia and India, pp. 1263, 1827; no comparable list is included in the subsequent edition. The
(continued...)

Webster's Third note that while the "anthropological and ethnological" definition of race referred to "distinct physical type[s]", such as the "Caucasian", "Malay". and Ethiopian" races, there was also a "popular use" which was applied to any group "because of a common or presumed common past", such as "the Anglo-Saxon race ... the Celtic race ... [and] the Hebrew race." (P. 1870) (emphasis omitted).

The long standing usage of the word "race" to encompass ancestry is reflected in the decisions of this Court. The military commander who in 1942 directed the eviction of the Japanese-Americans from the Pacific coast characterized individuals of Japanese descent as

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[61](...continued)
only ethnic group referred to as a race in Webster's Third is the Copts. P. 588.

belonging to "an enemy race" whose "racial strains are undiluted." Korematsu v. United States, 323 U.S. 214, 236 (1944) (Murphy, J., dissenting). The prosecutors office in Dallas County, Texas, utilized a jury-selection manual that instructed government attorneys, "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or well educated." Batson v. Kentucky, 90 L.Ed.2d 69, 92 n. 3 (1986) (Marshall, J., concurring). In Near v. Minnesota, 283 U.S. 697 (1931), Chief Justice Hughes described the newspaper whose publication the government sought to restrain as "largely devoted to malicious, scandalous and defamatory articles' concerning . . . the Jewish race." 283 U.S. at 703. See also Hirabayashi v. United States, 320

U.S. 81, 111 (1943) ("Jewish race"); Fong Yue Ting v. United States, 149 U.S. 698, 757 (1893) (Field, J., dissenting) ("Jew[ish] ... race.") The decisions of this Court are replete with references to "the Chinese race." [62]

An American coming of age after 1960[63] doubtless uses and understands the word "race" differently than did his or her parents, or the framers of the Civil Rights Act of 1866. This is certainly a

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[62] E.g. United States v. Wong Kim Ark, 169 U.S. 649, 694, 696, 698 (1897) Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893); Quock Ting v. United States, 140 U.S. 417, 417 (1891).

[63] The framers of the civil rights acts of the 1960's were from a generation familiar with the earlier use of the word "race," and certainly intended the prohibition against "racial" discrimination to be at least as broad as the prohibition contained in the Fourteenth Amendment. Regents of University of California v. Bakke, 438 U.S. 265 (1978); see n. 26, supra.

salutary development. For over a century the popular use of the word race, whether to refer to Arabs or Jews, Indians or Italians, has been a practice freighted with enormous potential for triggering or rationalizing ethnic hatreds.[64] Seventy-five years ago a prescient few objected in vain to the continued designation of such minority groups as separate races. [65] But change was to come only after the atrocities of World War II, the uprooting of the European colonial

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[64]"The theory of racial types was a fateful error which contributed significantly to Europe's imperial arrogance . . . and to the politics that entailed the murder of six million Jews' M. Banton & J. Harwood, The Race Concept, 32 (1975).

[65]Sen. Doc. No. 747, 61st Cong., 3d Sess., pp. 17-20 (1911) (testimony of Union of American Hebrew Congregations). Other early objections are described in A. Montague, The Concept of Race, pp. 15 et. seq. (1964).

empires, and the civil rights movement revealed the danger inherent in such racial designations. [66] Today most Americans avoid characterizing ethnic groups as "races" because such language necessarily carries an offensive implication that the speaker regards the group referred to as in some manner inferior.[67] The gradual substitution of words such as "people", "ancestry" and "ethnic group" in contexts where "race" was once used is an event of sociological as well as etymological significance.

But the language used in 1866 by the men who framed, debated and adopted the Civil Rights Act of that year must be

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[66] Ashley Montague's Man's Most Dangerous Myth: The Fallacy of Race (1942) played a critical role in bringing this popular use of the term into disrepute.

[67] But see infra p. 34 n.19.

understood in the light of the meaning commonly given those words 121 years ago. At that time, to anyone except perhaps to a minority of ethnologists, the word "race" referred to any distinct ethnic group, and racial discrimination meant discrimination on account of such ancestry.

D. The Legislative History of Section 1981

The term "race" was used throughout the debates of 1866 to refer to the ancestry of an individual. In defending the proposal in section 1 of the Civil Rights Act to extend citizenship to all native born Americans, Senator Morrill admonished:

> [A]ll the varieties of the races of the nations of the earth have gathered here. In the early settlements of the country, the Irish, the French, the Swede, the Turk, the Italian, the Moor, and so might

> I enumerate all the races and all the variety of races, came here. [68]

Senator Davis, opposing that citizenship clause, argued that the nation had been founded by and for Europeans, including "the Scandinavian races of the North", rather than "the barbarian races of Asia."[69] Senator Hendricks asserted that American citizenship belonged and should be limited to "the inhabitants of the United States who were descended from the great races of Europe."[70] In other debates in 1866 regarding the Civil Rights Act and related legislation, speakers referred to "the Chinese

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[68]Cong. Globe, 39th Cong., 1st Sess. 570 (1866).

[69]Id. at 499 (emphasis added)

[70]Id. at 2939 (emphasis added).

race",[71] "the Latin races," [72] "the Spanish race",[73] and the "Anglo-Saxon race."[74] President Johnson, in his message vetoing the 1866 Civil Rights Act, characterized "the people called Gypsies" as a race,[75] as did several members of Congress.[76]

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[71] Id. at 498 (remarks of Sen. Cowan), 523 (remarks of Sen. Davis); see also id. at 497 (remarks of Senator Van Winkle) (the "inferior races that are now settling on our pacific coast") (emphasis added), 1269 (remarks of Rep. Kerr.) ("race" of "coolies")

[72] Id. at 238 (remarks of Rep. Kasson)

[73] Id. at 251 (remarks of Sen. Morrill).

[74] Id. at 180 (remarks of Rep. Scofield), 238 (remarks of Rep. Kasson), 291 (remarks of Sen. Nesmith), 209 (remarks of Sen. Stewart), 542 (remarks of Rep. Dawson).

[75] Id. at 1857.

[76] Id. at 1759 (remarks of Sen. Trumbull) (gypsies are within the protections of a presidential order

(continued...)

Members of the thirty-ninth Congress repeatedly equated "white" with "Anglo-Saxon". Senator Stewart admonished, "I believe the Anglo-Saxon race can govern this country . . . . I believe the white man can govern it without the aid of the negro." [77] Representative Dawson argued

> We have, then, to insist upon it that this government was made for the white race . . . . We must make our own laws and shape our own destiny. Negro suffrage will, in its tendency, force down the Anglo-Saxon to the negro level, and result inevitably in amalgamation and deterioration of our race [78].

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[76](...continued)
forbidding discrimination based on "color or caste"), 2891 (remarks of Sen. Cowan), 3215 (remarks of Rep. Niblack)(Civil Rights Act protects gypsies)

[77]Id. at 1120; see also id at 298 (remarks of Sen. Stewart) ("this is a white man's government . . . . we are a race descended from the original Anglo-Saxon stock")

[78]Id at 542.

Senator Nesmith also equated "white" with "Anglo-Saxon".[79]

The 1866 debates do contain a reference to the "Caucasian" race, but the passage makes clear that the speaker understood the term to refer only to individuals of European ancestry. Speaking of past practices in granting American citizenship, Senator Davis asserted:

> The whole material out of which citizens were made . . . was from the European nationalities, from the Caucasian race, if I may use the term . . . . I controvert that a single citizen was ever made by one of the States out of the Chinese race, out of the Hindoos, or out of any other race of people but the

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[79] Id. at 291 ("I still believe that this is a white man's government, framed by white men . . . . [T]he hardy, persevering, industrious, brave, and intelligent Anglo-Saxon race and their descendants. . . are not to be overridden").

Caucasian race of Europe.[80]

Davis' insistence that Hindus were not "Caucasian" makes clear that he was using that word in a manner quite different from do modern ethnologists. Other speakers maintained that not all the natives of Europe itself were "white", arguing, for example, that Basques are not "what we call white men."[81]

Representative Dawson, using the term "race" in a similar manner, insisted that Jews were a race:

> It is the homogeneous races which have controlled the world. The Jew, though without a country and every where the object of prejudice, yet maintains his physical and mental excellence even to this present day; and it is because he intermarries chiefly with his own race.

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[80] Cong. Globe, 39th Cong., 1st Sess., 523 (1866).

[81] Id. at 306 (Rep. Kelley).

Representative Kerr expressly regarded Mexicans just as a distinct race, like blacks and orientals.[82]

Those who supported the adoption of the 1866 Act expressly intended that it would protect from discrimination not only newly freed slaves, but also immigrant groups whose ancestry was or might become the object of popular hostility. In the two decades prior to the Civil War, such hostility had been a major factor in American political life, destroying the old Whig party and at times eclipsing slavery as the dominant national issue. That bigotry, the primary policy of a movement known as Nativism or know Nothingism, was largely directed against two unpopular groups--the Irish immigrants in the northeast,

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[82] Id. at 1268 (emphasis added).

and the German immigrants in the midwest. Nativist groups and individuals circulated a variety of proposals for restricting the rights of these groups, and the flourishing bigotry at times led to bloodshed. One Know Nothing tract described the Germans and Irish as "degenerated races" imbued with "bitter hostility ... for the Anglo-Norman race." These new immigrants, the Know Nothings argued, lacked the intelligence, honesty and democratic principles of native Americans: "It is contrary to the laws of nature for any two people so unlike physically, mentally, morally, socially, and politically to live together under the same jurisdiction.... It is a conflict of races."[83]

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[83] Samuel C. Busey, Immigration: Its Evils and Consequences, pp. 23, 39, 42 (1856).

In 1854 and 1855 the nativist Know Nothing party captured control of the state legislatures in Massachusetts, Maryland, California Connecticut and Indiana, and in 1856 the Know Nothing candidate received 25% of the popular vote in the presidential election.[84] German and Irish immigrants were openly denounced on the halls of Congress.[85] In response, the Republican platform of 1860 expressly denounced the Know Nothing movement, and declared the Republicans "in favor of giving a full and efficient

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[84] See generally Ray Allen Billington, The Protestant Crusade 1800-1860: A Study of the Origins of American Nativism (1963); M. Evangeline Thomas, Nativism in the Old Northwest, 1850-60 (1936); Humphrey J. Desmond, The Know-Nothing Party (1904).

[85] See, e.g. Cong. Globe, 34th Cong., 1st Sess., 1409-14 (1856) (remarks of Sen. Adams).

protection to the rights of all classes of citizens, whether native or naturalized. . . ."[86] German voters played a pivotal role in the election of Lincoln in 1860, and the successful Republican effort to win their ballots was coordinated by Carl Schurz,[87] who six years later played a key role in winning congressional support for the protections embodied in both the Fourteenth Amendment and the 1866 Civil Rights Act.[88]

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[86]Franklin L. Burdette, The Republican Party: A Short History, 149 (2d ed. 1972)

[87]Thomas, supra n. 84, 239.

[88]Joseph B. James, The Framing of the Fourteenth Amendment, 11, 17-19, 51 (1908); Memphis v. Greene, 451 U.S. 100, 131 n. 4, 132 (1981) (White, J., concurring). Schurz's report on the condition of blacks in the south was repeatedly referred to during the 1866 debates. See, e.g., Cong. Globe, 39th Cong., 1st Sess., App. 58 (remarks of Rep. Julian), 589 (remarks of Rep. Donnelly), 2083 (remarks of Rep. Perham).

This history of hostility towards German and Irish immigrants was one of the express concerns of the framers of the 1866 Civil Rights Act. Senator Shellabarger explained that the Act was intended to prohibit the states from engaging in the type of discrimination favored by the infamous Know Nothings. Section 1 of the Act, he urged, would if adopted defeat any attempt

> to deprive races and the members thereof as such of the rights enumerated in this act. . . .
>
> Who will say that Ohio can pass a law enacting that no man of the <u>German race</u> . . . shall ever own any property in Ohio, or shall ever make a contract in Ohio, or even inherit property in Ohio, or ever come into Ohio to live, or even to work? If Ohio may pass such a law, and exclude a German citizen, . . . because he is of the <u>German nationality or race</u>, then may every other State do

so. [89]

Representative Lawrence was equally unequivocal in his explanation that the Civil Rights Act was necessary to prohibit enactment of the discriminatory schemes of the Know Nothings:

> If the people of a state should become hostile to a large class of naturalized citizens and should enact laws to prohibit them and no other citizens from making contracts, from suing, from giving evidence, from inheriting, buying, holding, or selling property, or even from coming into the State, that would be . . . a denial of justice.
>
> Yet twelve years have not passed since these and other hostile measures against naturalized citizens were gravely discussed in several of the States... [90]

In urging adoption of the Fourteenth

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[89]Cong. Globe, 39th Cong., 1st Sess., 1294 (emphasis added).

[90]Id. at 1833.

Amendment, Representative Ashley analogized southern treatment of the freed men to the plight of unpopular immigrants "in the days of Know Nothingism"[91].

The virtually universal use of the term "race" in 1866 to refer to distinct ethnic groups is sufficient by itself to compel the conclusion that the "racial" discrimination forbidden by section 1981 is discrimination on the basis of ancestry. The Civil Rights Act of that year was framed by mid-nineteenth century lay men, not by late twentieth century ethnologists. The opponents of the Act expressly denounced as inferior "races" a variety of ethnic groups whom a modern anthropologists might categorize as Caucasian. Those who voted for the Civil

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[91] Id. at 2882.

Rights Act did so to protect, not only blacks, orientals, and Indians, but any ethnic group which, like blacks in the past, might in subsequent years be characterized as "inferior in mental caliber and lacking ... poise of character."[92]

The members of the Thirty-ninth Congress knew from the schemes of the infamous Know Nothings that the bigotry and abuses then being directed at blacks could with equal vehemence be inflicted on any ethnic group which did not happen to be Anglo-Saxon. Congress clearly intended to protect not only the particular ethnic groups that had been attacked by the Know Nothings, but also future immigrants who might be the

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[92] Id. at 177 (remarks of Rep. Boyer).

targets of similar hostility. As Representative Lawrence explained, in a speech given on the very day the House overrode President Johnson's veto and made the civil rights bill law:

> This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it becomes a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.[93]

In the decades since the Civil War the intolerance once directed at the Germans and the Irish has been focused on immigrants of other ancestries, Italian, Greek, Japanese, Chinese, Mexican-American, Puerto Rican, Jewish and Arab.

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[93] Id. at 1833.

In some instances events abroad have stirred up animosity towards groups that had long thought themselves fully accepted by their fellow Americans. The 1866 Civil Rights Act, remains, as it was intended to be, an essential charter of justice and equality for all Americans, the descendants of those who fled to our shores seeking to escape the hatreds and strife of the Old World, as well as the descendants of those who came here in chains, prisoners of the slave system that ended only with the victory of the Union army.

E. The Difficulties Inherent in Respondents' Proposed Construction of Section 1981

(1) The Definition of "Caucasian"

Petitioners urge that section 1981 permits discrimination on the basis of ancestry so long as both the victimized

group and the preferred group are "Caucasian". The federal courts, in order to administer such a distinction, would necessarily be required to establish and apply some official definition of "Caucasian", so that the racial identity of the various affected groups could be determined. The term Caucasian, however, unlike, for example, the word carbon, does not have among either the public or ethnologists a clear and unvarying meaning.

There was certainly no consensus in the mid-nineteenth century as to the definition of "Caucasian". One prominent authority, writing in 1854, commented, "What is meant by the word 'Caucasian?' Almost every ethnologist would give a

different reply."[94] The state of ethnology when the 1866 Civil Rights Act was adopted was depicted in detail in the New American Cyclopaedia of 1858. The Cyclopaedia set forth a summary of "the most important and generally accepted" racial classification systems, describing 24 different systems, based variously on complexion, hair, facial angle, skull volume, skull length, skull shape, and area of presumed origin. Half of these systems refer to the existence of a "Caucasian" race, but the definitions vary radically, and in a majority of the systems Arabs and Jews are not classified as Caucasian at all.[95] The editors of

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[94]Samuel George Morton, Types of Mankind, p.88 (1854) (emphasis omitted).

[95] See, e.g., v. 8, p. 307 (Fisher distinguishes homo Caucasicus from homo Arabicus), 307 (according to Desmoulins

(continued...)

the Cyclopaedia denounced the whole idea of a "Caucasian" race as "incorrect and inconvenient. (V. 8, pp. 306-11).

Today the term "Caucasian" is generally identified with the system proposed in 1790 by the German naturalist I. F. Blumenbach. The groups designated as Caucasian by Blumenbach, however, differ substantially from the views of

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95(...continued)
the Caucasian race is one of several races falling within the "Japetic stock;" the North African, Syrian and Adamic races belong instead to the "Arabian stock"), 308 (Martin distinguishes several separate nations in the Asiatic branch of the Japetic stock, including the Caucasic nation and the Semitic nation), 308-09 (according to Prichard the Caucasians, now found in Russia, are members of the ancient Allophylian race, as distinguished from the three modern races; among the modern races the Arabs and Jews belong to the Semitic or Syro-Arabian race, rather than the Indo-European or Aryan race), 310 (according to S.G. Morton the Caucasians are one branch of the Semitic species, whereas the Arabian tribes belong to the Ishmaelitic species).

subsequent ethnologists. On the Indian subcontinent, for example, Blumenbach expressly classified as Mongolian rather than Caucasian all inhabitants east of the Ganges, an area that includes all of Bangladesh and a significant portion of India. As for the rest of India, Blumenbach explained that "the Hindoos may be considered as a subdivision or secondary Race, distinct from the Caucasian." No subsequent ethnologist treats Asian Indians in this manner. Within Russia Blumenbach classified as Mongolian all inhabitants east of the Ob river, a region that coincides roughly with the region now known as Siberia. The population of this area, however, is overwhelmingly Russian, Tatar and

Finnish.[96] In addition to the Ganges and the Ob, Blumenbach also delineated as the Caspian Sea as marking the eastern boundary of the Caucasian race, but the Caspian Sea lies approximately 2000 miles to the west of the Ganges and the Ob. How Blumenbach proposed to treat natives of the region west of the Ob and Ganges, but east of the western shore of the Caspian Sea, is entirely unclear; a significant portion of respondent's native Iraq is not, to use Blumenbach's definition of Caucasian "on this side ... [of] the Caspian Sea."[97]

Early in this century this Court commented that "[t]he various authorities are in irreconcilable disagreement as to

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[96] Encyclopaedia Britannica, v. 20, pp. 599-600 (1963).

[97] A Manual of the Elements of Natural History, pp.36-38 (London 1825).

what constitutes a proper racial division." United States v. Thind, 261 U.S. at 211-12 (1923). Any consensus of that era soon shifted. The 1910 Encyclopedia Britannica, for example, classified as orientals the Finns, Lapps, and Turks, but characterized as Caucasian the Indonesians, the Hawaiians, and the Ainus of Japan. (V. 9, p. 850). The 1986 Encyclopedia Britannica, on the other hand, transferred the Finns, Lapps and Turks into the Caucasian race, placed the Indonesians and Hawaiians in a new group denoted "Malay-Australoid-Oceanic," and described as still unresolved the appropriate classification of the Ainus. (V. 18, pp. 973, 976-77). The classification of Turks is of particular importance, since the Turks for centuries ruled much of the Arab world, and some

Arabs undoubtedly are in part of Turkish ancestry.

Acceptance of petitioners' proposed distinction between Caucasians and non-Caucasians would require this Court to promulgate an official judicial system of racial classification, delineating which ethnic groups fall into which category. Utilization of Blumenbach's original system however, would be at odds with the views of virtually all subsequent ethnologists. It seems equally inconceivable, on the other hand, that the protections of section 1981 are to expand and contract with the substantial changes in ethnological thinking that have occurred since 1866, and that might indeed occur in the future.[98] Half a

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[98] With regard to Asian Indians, for example, the Encyclopedia Britannica

(continued...)

century ago this Court observed that the delineation of the members of a so-called Caucasian race was "the most debatable field in the whole range of anthropological studies", and that to arrange the peoples of mankind into such sharply bounded divisions is an undertaking of such uncertainty "that common agreement is practically impossible." United States v. Thind, 261 U.S. 204, 211 n.4, 212. The only peoples whom all authorities have agreed are Caucasian are the original inhabitants of Western Europe, a group of which respondent, of course, is not a member.

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[98](...continued)
notes "It is possible that the inhabitants of India will prove to belong to an Asiatic subrace, or even a separate race, serologically, but information is still lacking." V. 2, p. 52 (1963).

Petitioners apparently urge this Court to hold that Arabs as a group are Caucasian, and thus outside the protections of section 1981 (Pet. Br. 29). But even under petitioners' view of section 1981, a significant number of Arab-Americans would in fact be protected by that statute. The Arabs of the Sudan, like the Jews of Ethiopia, are black. Arabs of mixed or primarily black ancestry are frequently found in the southern portions of Morocco, Algeria, Libya, and Egypt. Among Asian Arabs, there is a significant amount of oriental ancestry. Respondents' native Iraq, for example, was occupied and ruled by the Mongols from 1258 to 1508. Subsequently the Turks, who until recently were classified as non-Caucasian, occupied Iraq from 1534 up to

1917.[99] Similarly, although petitioners appear to maintain that all Mexican-Americans are "white," and thus outside the scope of section 1981, many Mexican-Americans are in fact of Indian ancestry[100]

Petitioners seem to contend that these problems can be overcome simply by asking a complainant to declare whether he regards himself as Caucasian; indeed that contention seems to be the core of petitioners' argument. (Pet. Br. 9-10, 18, 36). But whether respondent is "Caucasian" within petitioners' proposed construction of section 1981 would turn on the legal definition of Caucasian, of which respondent could not have been

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[99] Encyclopedia Britannica, v. 21, p. 943 (1988).

[100] Encyclopedia Britannica, v. 15, p. 387 (1963).

aware, and on the race of respondent's possibly remote ancestors, which respondent did not purport to describe. The fact that respondent chooses to regard himself as Caucasian is of no obvious relevance. Homer Plessy expressly insisted that because he appeared to be white and had "the reputation of belonging to the dominant race" he was entitled to be treated as white, Plessy v. Ferguson, 163 U.S. 537, 542, 549 (1896); neither the majority nor the dissent in Plessy thought Plessy's self-image to be of any legal relevance.

(2) Discrimination on the Basis of Color

In McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), this Court held that section 1981 prohibits discrimination on the basis of color as well as discrimination on the

basis of race. 427 U.S. at 287-95. Section 1981 clearly forbids an employer to discriminate on account of color even among individuals of the same race, and petitioners do not suggest otherwise. Petitioners urge only that the complaint and related pleadings cannot fairly be read as alleging discrimination on the basis of color, an issue not addressed by the lower courts.[101]

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[101]The district court observed that "The thrust of plaintiff's claim, namely, that he was denied tenure by St. Francis College because he is an Arabian born in Iraq, is clear to all concerned." (Pet. App. 7(a). In an affidavit filed in opposition to petitioners' motion for summary judgment, respondent asserted "I, with others of Arab ancestry, have darker skin color than those customarily referred to as Caucasian". (J. App. 89-90). Respondent can reasonably be understood to have contended in the district court that respondents discriminated against Arabs because of their color. The existence of that contention, we believe, provides an alternative ground for affirmance.

If, as McDonald holds, section 1981 prohibits discrimination on the basis of color, there would be little sense to petitioner's constricted reading of the statutory prohibition against racial discrimination. Most Arabs, like most Asian Indians, are of a decidedly darker complexion than most Europeans.[102] If St. Francis college discriminated against Arabs as a group because of their color, that would clearly violate section 1981, and entitle any injured Arab to relief. The difference between discriminating against Arabs because of their color, a practice undeniably forbidden by section 1981, and discriminating against Arabs

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[102] This Court commented in United States v. Thind that "The Arabs and Swedes ... are scarcely less different than the Americans and Malays, who are set down as two distinct races." 261 U.S. at 211 n.4.

because of their ancestry, which petitioners urge to be legal, is elusive at best.

As a practical matter, many of the "Caucasian" groups that have been the most frequent victims of discrimination are, like Arabs, generally characterized by a complexion darker than Americans of European ancestry. Most of the section 1981 ancestry cases have been brought by plaintiffs who would have been classified as non-white under Thind and Morrison.[103] For those who regard a dark

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103 See, e.g., Shah v. Mt. Zion Hospital, 642 F.2d 268 (9th Cir. 1981) (Asian Indian); Shah v. Halliburton, 627 F.2d 1055 (10th Cir. 1980) (Asian Indian); Sethy v. Alameda County Water Dist., 545 F.2d 1157 (9th Cir. 1986) (Asian Indian); Rajender v. University of Minnesota, 24 F.E.P. Cas. 1051 (D. Minn. 1979) (Asian Indian); Anandam v. Fort Wayne Community Schools, 19 F.E.P. Cas. 773 (N.D. Ind. 1978) (Asian Indian); Jawa v. Fayetteville State University, 426 (continued...)

complexion as a sign of racial inferiority, the difference between discrimination on the basis of race and discrimination on the basis of color would be meaningless.

103(...continued)
F.Supp. 218 (E.D.N.C. 1976) (Asian Indian); Sud v. Import Motors Limited, Inc., 379 F. Supp. 1064 (W.D. Mich. 1974) (Asian Indians); Na[illegible]ne v. Western Electric Co., 507 F.2d 590 (8th Cir. 1974) (Asian Indian); Banker v. Time Chemical, Inc., 579 F. Supp. 1183 (N.D. Ill. 1903) (Asian Indian) Barvah v. Young, 536 F. Supp. 356 (D.Md. 1982) (Asian Indian); Khawaja v. Wyatt, 494 F. Supp. 302 (W.D.N.Y. 1980) (Pakistani); Tayyari v. New Mexico State University, 495 F. Supp. 1365 (D.N.M. 1980) (Iranian); Abdulrahim v. Gene B. Glick Co., 612 F. Supp. 256 (C.D. Ind. 1985) (Syrian); Annoya v. Hilton Hotels Corp., 733 F.2d 48 (7th Cir. 1984) (Iraqi); Alizadeh v. Safeway Stores, Inc., 41 F.E.P. Cas. 1556 (5th Cir. 1986) (Iranian); Ibrahim v. New York Dept. of Health, 581 F. Supp. 228 (E.D.N.Y. 1984) (Egyptian); Saad v. Burns International Security Services, 456 F. Supp. 33. (C.D. 1978) ("Arabian") Gonzalez v. Stanford Applied Engineering, 597 F.2d 1298 (9th Cir. 1979) (Mexican American).

III. THE THIRD CIRCUIT CORRECTLY REFUSED TO GIVE RETROSPECTIVE EFFECT TO ITS DECISION IN GOODMAN v. LUKENS STEEL

Two years ago this Court held in Wilson v. Garcia, 85 L.Ed.2d 254 (1985), that the limitations period for a section 1983 action should be the period established by state law for an action for damages for personal injuries. The rule in Wilson was adopted for the avowed purpose of overturning the quite different standard that had been applied by the lower federal courts prior to 1985. The majority opinion in Wilson expressly denounced the approach of most circuit courts, 85 L.Ed.2d at 264-65 and nn. 25, 32, 33, and did not dispute Justice O'Connor's observation that the Wilson rule overruled decisions in almost every circuit and "leaves behind a century of precedent." 85 L.Ed.2d at

220-71 (dissenting opinion). Although Wilson was intended to reduce in the long term both litigation and uncertainty, the immediate impact of that decision was to create turmoil in the large number of section 1983 cases that had been filed at a time when most circuits applied limitations rules different than that contemplated by Wilson. See Mulligan v. Hazard, 54 U.S.L.W. 3808 (1986) (White, J., dissenting from denial of certiorari).

The instant action arises under section 1981, not section 1983. The decision in Wilson was grounded on the legislative history of the Civil Rights Act of 1871, from which section 1983 derives, not on the rather different concerns underlying the Civil Rights Act of 1866, from which section 1981 is

taken. 85 L.Ed.2d at 266-68. Despite that difference, the third circuit has held that the Wilson rule should be applied to section 1981 actions, thus shortening the limitations period in Pennsylvania federal courts from six years to two. Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985). This Court subsequently granted certiorari in Goodman to decide whether this extension of Wilson to section 1981 cases was correct. (No. 85-1626). We agree with the view advanced by the petitioners in Goodman that six years is the appropriate period of limitations period for a section 1981 action in Pennsylvania. Should this Court hold otherwise, however, we urge that Goodman should not be applied retroactively to the instant case.

(1) Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), directs that three factors be considered in evaluating whether a judicial decision should be applied retroactively: (1) whether that decision "overrul[ed] clear past precedent on which litigants may have relied ... or ... decid[ed] an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether retrospective operation will further or retard the purpose of the rule established by that decision, and (3) whether retroactive application "could produce substantial inequitable results." 404 U.S. at 106-07. The interpretation of these principles is of considerable importance, for they affect the outcome not only of civil litigation, such as the instant case, but also of criminal

proceedings as well. See 404 U.S. at 106. In a civil proceeding, whether or not a decision is applied retrospectively may affect whether a particular action may be time barred, as well as the amount of back pay which may be awarded.

Notwithstanding the ongoing disputes about how to apply these principles to the decision in Wilson v. Garcia, the circuit courts have readily arrived at a consensus on several issues. All the circuit courts to reach the question agree that Wilson should be applied retrospectively where it has the effect of lengthening the applicable limitations period.[104] The decision in Wilson itself

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104 Bartholomew v. Fischl, 782 F.2d 1148, 1155-56 (3d Cir. 1986); Jones v. Shankland, 800 F.2d 77, 80 (6th Cir. 1986); Farmer v. Cook 782 F.2d 780, 780-81 (8th Cir. 1986); Jones v. Preuit & Maudlin, 763 F.2d 1250 (11th Cir. 1985); (continued...)

arguably constituted just such a retroactive application; Wilson applied a three year limitation period to section 1983 actions arising in New Mexico, despite the fact that prior state decisions had utilized a two year rule.[105] In states where Wilson had the effect of lengthening the limitations period, retrospective application is clearly appropriate under Chevron. Since it is the plaintiff who decides when a civil action will be filed, plaintiffs often if not ordinarily rely on the limitations rule in effect at a given

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[104](...continued)
Rivera v. Green 775 F.2d 1381, 1383-84 (9th Cir. 1985); Marks v. Parra, 785 F.2d 1419, 1419-20 (9th Cir. 1986).

[105] DeVargas v. New Mexico, 97 N.M. 563, 642 P.2d 166 (1982). There was also tenth circuit precedent supporting the shorter limitations period. Zuniga v. AMFAC Foods, Inc., 580 F.2d 380 (10th Cir. 1978).

time. A defendant, on the other hand, is primarily if not exclusively concerned with the substantive commands of a statute; once an arguable violation has occurred, a defendant rarely takes actions that might be affected by knowledge of the relevant limitations period. None of the defendants in the post-Wilson litigation appear to have asserted that they relied in any way on the pre-Wilson caselaw.[106]

The circuit courts are similarly in agreement that Wilson should not be applied retroactively where Wilson had the effect of overturning a clearly established circuit rule, on which a plaintiff might have relied, establishing a longer period of limitations. A number

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106 See Bartholomew v. Fischl, 782 F.2d at 1148.

of decisions, including the third circuit decision in the instant case, have refused for this reason to give Wilson retroactive effect.[107] Significantly, even the appellate decisions that have applied Wilson retroactively to dismiss a complaint have insisted that such retroactive application would have been inappropriate had the plaintiff had a stronger claim of reliance on pre-Wilson case law.[108] In Wilson itself this Court quoted with apparent approval the tenth circuit's decision that that circuit's

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[107] Anton v. Lehpamer, 787 F.2d 1141, 1142-46 (7th Cir. 1986); Ridgway v. Wapello County, Iowa, 795 F.2d 646, 647-48 (8th Cir. 1986); Gibson v. United States, 781 F.2d 1334, 1339-40 (9th Cir. 1986); Jones v. Bechtel, 788 F.2d 571, 573-74 (9th Cir. 1986); Jackson v. City of Bloomfield, 731 F.2d 652, 653-55 (10th Cir. 1984).

[108] Smith v. Pittsburgh, 764 F.2d 188, 195 (3d Cir. 1985); Wycoff v. Menke, 773 F.2d 983, 986-87 (8th Cir. 1985).

decision in Wilson "would not be applied retroactively to bar 'plaintiffs' right to their day in court when their action was timely under the law in effect at the time their suit was commenced.'" Wilson v. Garcia, 85 L.Ed.2d at 260 n. 10, quoting Jackson v. City of Bloomfield, 731 F.2d 652, 655 (10th Cir. 1984).

In applying this principle the courts of appeals have correctly looked to the state of the law in the particular circuit in which the action at issue arose. Chevron itself mandated precisely such an inquiry into the law of each circuit. The decision denied retroactive application in Chevron, this Court explained,

> overruled a long line of decisions by the Court of Appeals for the Fifth Circuit.... When the respondent was injured ... these Court of Appeals decisions represented the law governing his

> case. It cannot be assumed that he ... could foresee that this consistent interpretation would be overturned. The most he could do was to rely on the law as it then was. 404 U.S. at 107.

This Court has also looked to the law of each circuit in determining whether a government official should have known that his or her conduct was unconstitutional. Procunier v. Navarette, 434 U.S., 555, 563-65 (1978).

In the instant case, however, petitioners assert that reliance on circuit caselaw is never warranted, since there is always a possibility that this Court will overturn such a precedent. That argument ignores not only the holding to the contrary in Chevron and Procunier, but also the manner in which this Court exercises its discretionary jurisdiction. Most issues decided by the appellate courts are not accepted for

further review by this Court; for most litigants, and most issues, the law of the circuit is the law that will govern. Prior to granting certiorari in Garcia this Court had repeatedly refused to review appellate decisions regarding which state limitations rule should be applied in a section 1983 action.[109]

(2) Although the possible retroactive application of Wilson may in other contexts present difficult issues, the instant case is a relatively clear one. Under Wilson the appropriate period of limitations for a section 1983 action arising in Pennsylvania is now two years. (Pet. App., 13a). Petitioners urged that this two year rule should be extended to

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109 This Court denied certiorari in at least eight such cases between 1979 and 1982 alone. See Garcia v. Wilson, 731 F.2d at 642-48.

section 1981 claims, and should be applied retroactively to claims arising in 1978, some seven years before Wilson was decided.

The panel below, however, noted that the third circuit, "from at least 1977 until 1985, had applied Pennsylvania's six-year statute of limitations in discrimination cases brought under Section 1981." (Pet. App. 13a).[110] After 1977, the panel observed, "a potential plaintiff ... could be fairly confident that a federal court in this Circuit would apply Pennsylvania's six-year statute of limitations to his or her section 1981 claim." (Pet. App. 15a). Because the law after 1978 was

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[110] The district court also noted that the third circuit had "uniformly concluded" that the six year limitation period applied to § 1981. (Pet. App. 58a).

"absolutely clear," the court below reasoned, respondent "could reasonably have relied upon them when deciding to delay filing his Section 1981 claim." (Pet. App. 16a). The third circuit thus concluded that retroactive application of Wilson and Goodman would be inappropriate in the instant case.

Petitioners urge, first, that the third circuit misread its own decisions when it held that the applicability of the six-year limitation period was well established by 1977 or 1978. (Pet. App. 50-53). A circuit court's reading of its own past decisions, however, is entitled to considerable deference. Such deference is particularly appropriate here, since Judge Adams, who joined the decision below, had also sat on the panels which decided several of the

earlier third circuit cases relied on.[111] In the instant case the appellate panel's reading of prior third circuit caselaw was clearly correct. Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 902 (3d Cir. 1977) held that a six year limitation rule would apply to a section 1981 claim in which a plaintiff alleged "the denial of his right to lawfully pursue his ... employment." 559 F.2d at 902. Davis v. United States Steel Supply, 581 F.2d 333 (3d Cir. 1978), again applied that six year limitation period, reasoning that a claim of racial discrimination in employment was analogous to wrongful interference with economic rights or interests, a tort

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[111] Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978) and Meyers v. Pennypack Woods Home Ownership Ass'n., 559 F.2d 894 (3d Cir. 1977).

governed by the six-year rule under Pennsylvania law, rather than to a claim for assault, which state law required be filed within two years. 581 F.2d at 3338-39. See also Skehan v. Board of Trustees of Bloomsburg State College, 590 F.2d 470, 476-77 (3d Cir. 1978); Liotta v. National Forge Co., 629 F.2d 903, 906 (3d Cir. 1980), cert. denied, 451 U.S. 970 (1981).

Petitioners urge, in the alternative, that the third circuit decisions in Mayers, Davis, Skehan and Liotta were all vitiated as precedent by certain 1978 amendments to the Pennsylvania statutes. (Pet. Br. 52-53). The new Pennsylvania statute, like that which preceded it, provides a six-year limitations period for wrongful interference with an employment relation,

as well as for most contract actions. (Pet. App. 60-65). Even after the 1978 statute became effective, the third circuit continued to apply the six-year limitations rule to federal civil rights actions alleging unlawful denial of employment. Fitzgerald v. Larson, 741 F.2d 32, 35 (3d Cir. 1984) vacated and remanded in light of Wilson v. Garcia, 85 L.Ed.2d 424 (1985). Both the district court and the court of appeals in the instant case concluded that the minor changes made by the 1978 amendments were insufficient to render unreasonable further reliance on third circuit caselaw.[112]

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[112] Smith v. City of Pittsburgh, 764 F.2d 188, 195 n. 3 (3d Cir. 1985), suggests only that the decisions in Davis and Skehan, recognizing a six-year limitations rule where a plaintiff challenges the legality of the

(continued...)

Respondent is not a plaintiff who has slept on his rights, but a complainant whose efforts to receive a hearing have been repeatedly frustrated by changes in the law. In September 1978, well within the limitations period established by Title VII, respondent attempted to file a discrimination complaint with the Pennsylvania Human Relations Commission (PHRC). Although respondent submitted to PHRC written documents in support of this claim, PHRC refused to "docket" the complaint, explaining that "notification of impending termination at some future date was considered insufficient reason to

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112(...continued)
substantive basis for his dismissal or other treatment, may be of lesser significance in determining the applicable limitations period where a plaintiff alleges only that he or she was dismissed without procedural due process.

docket the charge or to proceed with the investigation." (Pet. App. 4a). PHRC instructed respondent that he could not file a charge based on the decision denying tenure, and directed him to do so only after "he had worked his last day at St. Francis College." (Id.) Respondent ended his employment at St. Francis on May 26, 1979, and filed a complaint with PHRC 27 days later. (Id.) PHRC subsequently reversed its filing rule, and dismissed respondent's complaint as untimely. Respondent then sought a right to sue letter from EEOC, and brought suit 85 days after receipt of that letter. The Third Circuit, applying retroactively Ricks v. Delaware State College, 449 U.S. 250 (1980), held that respondent's Title VII claim was barred because respondent had not succeeded in

filing an administrative complaint in 1978. (Pet. App. 9a-11a). The court of appeals also concluded, correctly in our view, that it would be unduly harsh to also apply retroactively both Wilson and Goodman, and thus deny respondent any hearing on the merits of his section 1981 claim. (Pet. App. 17a-18a).

(3) The primary source of controversy regarding the retroactivity of Wilson concerns whether that decision should be given retrospective effect where the circuit court decision overturned by Wilson had itself been decided only after the action at issue was filed. In Goodman v. Lukens Steel Co., for example, the complaint was filed in 1973, but the third circuit decisions establishing a six-year limitations period were not issued until 1977. That

problem has occurred in several circuits, and could theoretically arise in any circuit depending on the date on which a given action was commenced.

Although the situation that arose in Goodman presents a close case, we believe retroactivity would be inappropriate in such circumstances. Ordinarily a federal litigant must look to the law within his circuit to establish the rules that will govern his or her case; in some instances the law may already be "absolutely clear," but in others counsel will have to use a certain amount of judgment to ascertain how his or her case will be affected by existing circuit precedent. Where, as occurred in Goodman, counsel for plaintiffs correctly concluded that third circuit precedent, read in conjunction with state law, would result

in a six- year limitations period in that circuit, it would seem peculiar to penalize a party for relying on a legal judgment which, with regard to the law of that circuit, proved absolutely correct.

More importantly, Wilson's expressed goal of minimizing uncertainty and litigation can best be met by denying retroactive application in a situation like Goodman. Although Wilson overruled existing precedent in most federal circuits, many of those appellate opinions had only been issued within the last 15 years. If Wilson is applied retroactively to cases arising prior to the relevant circuit precedent, older cases will be subject to dismissal because of Wilson, while more recently filed cases in the same circuit will not. Applied in this way Wilson would result

in a lack of uniformity within a single circuit; such a divergence in the treatment of older and more recent cases has already emerged within several circuits.[113]

(4) Should this Court extend Wilson to actions arising under section 1981, and hold that that rule should be applied retroactively in Pennsylvania, this case should be remanded for further

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[113] Compare Goodman v. Lukens Steel Co., 777 F.2d at 120 (3d Cir. 1985) (Wilson applied retroactively to action filed in 1973, prior to 1977 decision establishing longer limitations period), with Pet. App. 15a-16a (Wilson not applied retroactively to action filed in 1980, after 1977 decisions establishing longer period of limitations); compare Wycoff v. Menke, 773 F.2d 983, 984-85 (8th Cir. 1985) (Wilson applied retroactively to action filed in 1981, prior to 1982 decision establishing longer period of limitations), with Ridgway v. Wopello County, Iowa, 795 F.2d 646, 647-49 (8th Cir. 1986) (Wilson not applied retroactively to action filed in 1983, after 1982 decision establishing longer period of limitations).

consideration regarding whether the complaint was nonetheless timely filed. Both in the district court[114] and in the court of appeals[115] we urged that petitioners were estopped from asserting the limitations defense because the President of St. Francis College, as well as the chairman of respondent's department, had admonished respondent throughout 1978 to "do nothing" until there was "a final decision" on his still pending application for tenure. (Pet. App. 3a). Such an admonition, if it occurred, would distinguish this case from Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 234-35 (1976),

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[114] Plaintiff's Brief in Opposition to Motion for Summary Judgment, pp. 17-18.

[115] Brief for Appellant, No. 80-1550 (3d Cir.), pp. 23-24.

in which "all parties ... understood" that the initial termination order was the employer's "final decision", and from Delaware State College v. Ricks, 449 U.S. 250, 261 (1980), where a final decision was merely the subject of a collateral grievance proceeding. If the asserted statements were in fact made in the instant case by college officials, the limitation period would begin to run no sooner than February 6, 1979, rather than February 23, 1978, and would thus fall within two years of the date in October 1980 when the complaint was filed.

In the proceedings below, however, petitioners apparently denied that the College President and department chairman had indeed requested respondent to defer any action while his tenure application remained under consideration by the

faculty senate, the faculty affairs committee, and the tenure committee, or that those officials had represented that the college had not yet made a final decision.[116] The lower courts did not resolve this dispute, since both believed that a six year limitation period should apply in this case.[117] Accordingly, if

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[116] Brief for Appellees, No. 80-1550 (3d Cir.), p. 23 n. 9 ("appellees do not waive the right to factually and legally dispute and contest the accuracy and admissibility of the statements or conclusions therein.")

[117] The Title VII claim was held untimely by Judge Ziegler in 1981 (Pet. App. 50-55a); in 1985 the section 1981 claim was dismissed by Judge Mencer for failure to state a claim on which relief could be granted. (Pet. App. 44a-45a). Although the estoppel claim was clearly raised when the section 1981 claim was considered by Judge Mencer, the court of appeals held that respondent could not rely on estoppel to save his Title VII claim because that argument had not been raised four years earlier when Judge Ziegler was considering the timeliness of the Title VII count. (Pet. App. 10a n. 7).

this Court concludes that a two year limitation rule should be applied, the case should be remanded for a determination regarding the substance of the disputed representations.

CONCLUSION

For the above reasons the judgment and opinion of the third circuit should be affirmed.

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APPENDIX

APPENDIX A

Racial Classifications Utilized by the Bureau of Immigration and Naturalization

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This table sets forth each of the classifications utilized by the Bureau, together with the annual report in which that classification first appeared. The classifications utilized in the 1899 report remained in regular use until the 1930's; the other classifications appeared only intermittently. The spelling and parenthetical explanations are as they appear in the original reports.

Race	Annual Report
African (black)	1899, p.6
Albanian	1899, p.6
Arabian	1901, p.21
Armenian	1899, p.21
Australian	1899, p.7
Bulgarian	1899, p.21
Bohemian and Moravian	1899, p.21
Brazilian	1913, p.12
Canadian	1908, p.176
Central American	1899, p.6
Chinese	1899, p.6
Croatian	1899, p.6
Corean	1901, p.19
Cuban	1899, p.6
Dalmatian, Bosnian and Herzegovinian	1899, p.6
Danish	1908, p.176

Race	Annual Report
Dutch and Flemish	1899, p.6
East Indian	1899, p.6
English	1899, p.6
Eskimo	1901, p.21
Filipino	1901, p.19
Finnish	1899, p.6
French	1899, p.6
German	1899, p.6
Greek	1899, p.6
Hawaiian	1899, p.6
Hebrew	1899, p.6
Hungarian	1899, p.6
Iberic	1904, p.55
Irish	1899, p.6
Italian (northern)	1899, p.6
Italian (southern)	1899, p.6
Japanese	1899, p.6
Keltic	1904, p.55
Korean	1899, p.7
Lettish	1908, p.176
Lithuanian	1899, p.6
Magyar	1899, p.6
Mexican	1899, p.6
Mongolic	1904, p.55
Montenegrin	1899, p.6
Norwegian	1908, p.176
Pacific Islander	1899, p.6
Polish	1899, p.6
Portugese	1899, p.6
Roumanian	1899, p.7
Russian	1899, p.7
Ruthenian (Russniak)	1899, p.7
Scandinavian (Norwegians, Danes and Swedes)	1899, p.7
Scotch	1899, p.7
Servian	1899, p.7

Race	Annual Report
Slavick	1904, p.55
Slovak	1899, p.7
South American	1899, p.6
Spanish	1899, p.7
Swede	1908, p.176
Syrian	1899, p.7
Teutonic	1904, p.55
Transylvanian (Siebenburger)	1899, p.7
Turkish	1899, p.7
Wallachian	1899, p.7
Welsh	1899, p.7
West Indian	1899, p.7

APPENDIX B

Racial Tables in Annual Reports of the Commissioner General of Immigration

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The Bureau of Immigration prior to 1902 was part of the Department of the Treasury. Thereafter it was at times part of the Departments of Commerce (1902-1901), Labor (1909-1940) and Justice (1940-present).

Year of Report	Page	Races Listed
1900	6-7	50 (including Syrian, Hebrew, Spanish, Cuban, Mexican, Central American and South American)
1901	9	10 (the "principal races" immigrating to the United States; includes Hebrew and Spanish American)
	18-19	41 (including Cuban, Hebrew, Mexican, Spanish, and Syrian)
1902	12	12 (including Hebrew)
	37	12 (including Hebrews and Syrians)
	62	31 (including Hebrews, Spanish, and Syrian) (similar list at p.63)

	Diagram No. 1	17 (including Hebrew)
1903	10-11	10 (including Hebrew)
	42	14 (including Hebrews and Syrians)
	73	34 (including Cuban, Hebrew, Spanish and Syrian) (similar table at p.74)
1904	9	18 ("principal racial elements of the total immigration"; includes Hebrews)
	Chart 2	34 (including Hebrew, Cuban, Spanish, Syrian) (see p. 160 "racial grand divisions of Europe" and "racial subdivisions")
	42	14 (including Hebrews and Syrians)
	49-50	39 ("subdivisions of races"; including Cuban, Hebrew, Mexican, Spanish, Spanish-American, and Syrian) (similar tables at p. 54, 56, 57, 58, 61, 62, 65, 66, 68, 70, 72, 74 80-84, 108-9, 111)
	55	5 ("grand division of race") (similar tables at Chart 4, pp. 62, 63)
1905	11	19 (including Hebrews)
	Chart 3	34 (including Hebrew, Cuban, Spanish and

		Syrian)
	60	38 (including Cuban, Hebrew, Mexican, Spanish, Spanish American, and Syrian) (similar tables at pp. 62, 65, chart 11)
	62	5 ("grand division of race")
1906	7	6 (assets of various races, including Hebrews)
	Chart 2	34 (including Hebrew, Syrian, Cuban, Spanish, and Spanish American)
1908	166-67	38 (including Cuban, Hebrew, Spanish and Syrian)
	176	33 (including Hebrew, Mexican and Puerto Rican)
1909	19	39 (including Cuban, Hebrew, Spanish, Spanish-American, and Syrian)
1912	7-8	14 (including Hebrew and Syrian)
1913	12-14	11 (including Syrian, Hebrew, and Arabian)
1914	235	9 (including Hebrew and Syrian)
	246	23 (including Hebrew and Syrian)
	330	29 (including Hebrew, Mexican, Spanish American, and Cuban)
1915	159	14 (including Hebrew, Mexican, Spanish, Spanish-American, and

		Syrian)
1916	110	13 (includes Hebrew, Mexican, Spanish, and Syrian)
1917	118	12 (including Hebrew, Mexican, Spanish and Syrian)
1919	46-50	15 (including Syrians, a "subject race" of Turkey)
	80	39 (including Cuban, Hebrew, Mexican, Spanish, Spanish-American and Syrian)
1920	14	37 (including Cuban, Hebrew, Mexican, Spanish, Spanish-American and Syrian)
1922	17	36 (including Hebrew, Mexican, Spanish, Spanish American and Syrian)
	132	11 (including Hebrew, Spanish, and Syrian)
1923	198	11 (including Hebrew and Syrian)
1924	146	9 (including Hebrew and Syrian)
1929	6	9 ("principal" immigrant races; includes Hebrew and Mexican)
1930	28	12 (including Hebrew and Spanish)
1931	39	5 (including Mexican)
	47	12 (including Hebrew, Mexican and Spanish)
	50	9 (including Hebrew, Mexican and Spanish)
	212	6 (including Spanish)

1932	29	12 (including Mexicans and Spanish)
	37	11 (including Mexican and Hebrew)

Note: Listings of immigrants by "race" are also found in the U.S. Immigration Service Bulletin. The charts typically list approximately 38 races, including Cuban, Hebrew, Mexican, Spanish, Spanish-American and Syrian. See e.g. in volume 1 issues no.1, p.5; no.3, pp. 5,7; no.4, p.3; no.5, pp. 1-2,6; no.7, p.3; no.8, p.3 (1918); no.10, p.3; no.11, pp.1,3-4,8; no.12, p.3; no.13, p.3; no.14, p.3; no.15, p.3; no.16, p.3; no.17, pp.1,3,4.

APPENDIX C

"Race Classification",
Report of the Commissioner
General of Immigration: 1904,
pp. 161-62

"Race Classification."

Ninety-five per cent of the immigration to this country comes from Europe. This European immigration may be separated by race into well-recognized divisions, which conform more or less to geographical location. With the assistance of Prof. Otis T. Mason, curator of ethnology, National Museum, most of these different races or peoples, or more properly subdivisions of race, coming from Europe have been grouped into four grand divisions, as follows:

Teutonic division, from northern Europe: German, Scandinavian, English, Dutch, Flemish, and Finnish.

Iberic division, from southern Europe: South Italian, Greek, Portuguese, and Spanish; also Syrian from Turkey in Asia.

Keltic division, from western Europe: Irish, Welsh, Scotch, French, and North Italian.

Slavic division, from eastern Europe: Bohemian, Moravian, Bulgarian, Servian, Montenegrin, Croatian, Slovenian, Dalmatian, Bosnian, Herzegovinian, Hebrew, Lithuanian, Polish, Roumanian, Russian, Ruthenian, and Slovak.

The Mongolic division has also been added, to include Chinese, Japanese, Koran, East Indian, Pacific Islander, and Filipino.

Under "all other" have been included Magyar, Turkish, Armenian, African

(black), and subdivisions native to the Western Hemisphere.

By reason of blood mixture this classification is somewhat arbitrary, especially with regard to Finnish, Scotch, and Southern Germans."

APPENDIX D

Dictionaries Cited

Late nineteenth century dictionaries expressly based on Noah Webster's dictionaries are prefaced with [Webster's].

Thomas Dyche, A New General English Dictionary (London 1750)

Benj[amin] Martin, A New Universal English Dictionary (London 1754)

D. Bellamy, A New Complete English Dictionary (London 1760)

Samuel Johnson, A Dictionary of the English Language (3d ed., Dublin 1768)

N. Bailey, An Universal Etymological English Dictionary (London 1770)

John Ash, The New Complete Dictionary of the English Language (London 1775)

D. Fenning, The Royal English Dictionary (London 1775)

Thomas Sheridan, A Complete Dictionary of the English Language (London 1790)

John Walker, A Critical Pronouncing Dictionary (Dublin 1794)

James Barclay, A Complete and Universal English Dictionary (London 1799)

Samuel Johnson, A Dictionary of the English Language (9th ed., London 1805)

Noah Webster, An American Dictionary of the English Language (New York 1830)

Noah Webster, A Dictionary of the English Language (New York 1845)

Alexander Reid, A Dictionary of the English Language (New York 1846)

Joseph Worcester, A Universal and Critical Dictionary of the English Language (Boston 1846)

William Bolles, An Explanatory and Phonographic Pronouncing Dictionary of the English Language, (New London 1847)

John Boag, A Popular and Complete English Dictionary (Glasgow 1847)

John Craig, A New Universal Etymological, Technological, and Pronouncing Dictionary of the English Dictionary (London 1849)

Hyde Clark, A New and Comprehensive Dictionary of the English Language (London 1855)

Dan S. Smalley, The American Phoenetic Dictionary of the English Language (Cincinnati 1855)

[Webster] William Webster, An Explanatory

and Pronouncing Dictionary of the English Language (New York 1857)

James Donald, Chambers' English Dictionary (London 1872)

James Stormonth, Etymological and Pronouncing Dictionary of the English Language (Edinburgh 1874)

[Webster's] William G. Webster and William A. Wheeler, A Dictionary of the English Language (Academic Edition) (New York 1875)

John Wood, A Handy Dictionary of the English Language (New York 1875)

[Webster's] William Wheeler, Dictionary of the English language (Springfield, Mass. 1876)

Johnson's Pocket Dictionary of the English Language (London c.1877)

The Dictionary of Every-Day Difficulties in Reading, Writing, and Speaking the English Language (New York c.1890)

Webster's Academic Dictionary (New York 1895)

E.D.Price, The British Empire Dictionary of the English Language (London c.1899)

Chamber's Twentieth Century Definition of the English Language (London 1908)

Walter Skeat, An Etymological Dictionary of the English Language (Oxford 1910)

The Century Dictionary (New York 1911)

[Webster's], John Ogilvie, The New Modern English Illustrated Dictionary (New York 1913)

Webster's Collegiate Dictionary (Springfield, Mass. 1916.

The Winston Simplified Dictionary (Philadelphia 1919)

Ernest Weekley, An Etymological Dictionary of Modern English (London 1921)

The Concise Oxford Dictionary of Current English (Oxford 1923)

Henry C. Wyld, ed., The Universal Dictionary of the English Language (London 1932)

Webster's Collegiate Dictionary (Springfield, Mass. 1936)

Thorndike Century Senior Dictionary (Chicago 1941)

Odhams Dictionary of the English Language (London c.1946)

Funk and Wagnalls New College Standard Dictionary (New York 1947)

American College Dictionary (New York

1953)

Thorndike-Barnhart Comprehensive Desk Dictionary (Garden City 1955)

Webster's Second New International Dictionary (Springfield, Mass. 1956) (first printing, 1934)

Oxford Illustrated Dictionary (Oxford 1962)

Webster's Seventh New Collegiate Dictionary (Springfield, Mass. 1963)

Funk and Wagnalls Standard Dictionary of the English Language, International Edition (New York 1963)

Eric Partridge, Origins: A Short Etymological Dictionary of Modern English (New York 1966)

Random House Dictionary of the English Language: The Unabridged Edition (New York 1966)

Ernest Klein, A Comprehensive Etymological Dictionary of the English Language (New York 1967)

American Heritage Dictionary of the English Language (Boston 1969)

Webster's Third New International Dictionary (Springfield, Mass. 1971) (first printing 1961)

Oxford American Dictionary (New York 1980)

Webster's Ninth New Collegiate Dictionary
(Springfield, Mass. 1985)

APPENDIX E

Definitions of "Race"

This table lists definitions of race which refer to groups of human beings. Prior to about 1900 the term "generation" meant, inter alia, descendants, all the offspring generated by an individual; it is in this now archaic sense that generation occasionally appears as a definition of race. Volumes printed before 1800 often have no page numbers. Emphasis, where it appears, is in the original.

"The flock, family, lineage, or generation proceeding from father to son, etc."

Dyche (1750)

"Stock, family, lineage."

Martin (1750)

"In genealogy, it denotes a lineage or extraction continued from father to son."

Bellamy (1760)

"1. A family ascending 2. Family descending... 3. A generation; a collective family."

Johnson (1768)

"Lineage, family, stock."

Bailey (1770)

"A geneology, a family, a generation."

Ash (1775)

"A family ascending or descending. A generation."

Fenning (1775)

"A family ascending; family descending; a generation, a collective family."

Sheridan (1790)

"A family ascending or descending. A generation."

Barclay (1799)

"The lineage of a family, or contineud series of descendants from a parent who is called the stock."

Webster (1830)

"The lineage of a family; a generation."

Webster (1845), p.666

"The lineage of a family; a generation."

Reid (1846), p.334

"A family collectively; a family ascending; a family descending; ancestry; lineage; house; a generation."

Worcester (1846) p.754

"A family, ascending or descending. A generation; a collective family.

Bolles (1847), p.607

"The lineage of a family or continued series of descendants from a parent who is called the stock. A generation; a family of descendants.

Boag (1847) p.1061

"The lineage of a family, or continued stock of descendants; a generation; a family of descendants."

Craig (1849), p.505

"A family collectively; lineage."

Clark (1855) p.317

"A family collectively; a family ascending; a family descending; ancestry; progeny; lineage."

Smalley (1855) p.381

"The continued stock of descendants; a family of descendants..."

Webster's (1857) p.286

"Descendants of a common ancestor: a family."

Donald (1872) p.645

"A continued series of descendants from a parent, called the 'stock'; a family."

Stormonth (1874) p.499

"Descendants of a common ancestor."

Webster's (1875) p.347

"The descendants of a common ancestor; a family, tribe, people or nation, believed or presumed to belong to the same stock."

Webster's (1876) p.589

"A family; generation."

Johnson's (1877) p.142

"The lineage of a family; a generation."

Every-Day (c.1890) p.259

"Descendants of a common ancestor; a

family, tribe or nation, of the same stock; lineage..."

Webster's (1895) p.459

"Descent or lineage."

Price (c.1899) p.608

"The descendants of a common ancestor."

Chambers (1908) p.762

"A lineage, family."

Skeat (1910) p.494

"1. A genealogical line or stock; a class of persons allied by descent from a common ancestry; lineage; family; kindred; as the Levites were a race of priests; to be of royal or ignoble race...
2. An ethnical stock; a great division of mankind having in common certain distinguishing physical peculiarities, and thus a comprehensive class appearing to be derived from a distinct primitive source; as, the Caucasian race; the Mongolian race; the Negro race...
3. A tribal or national stock; a division or subdivision of one of the great racial stocks of mankind, distinguished by minor peculiarities; as, the Celtic race; the Finnic race is a branch of the Mongolian; the English, Franch, and Spaniards are mixed races."

Century (1911) p.4926

"1. The descendants of a common ancestor; a family, tribe, people or nation, believed to belong to the same stock; a lineage."
... 6. Ethnol. A division of mankind

possessing constant traits, transmissible by descent, sufficient to characterize it as a distinct human type."

Webster's (1916)

"A class of beings having similar qualities; as, the human race; a division of human beings; as, the white race; a nation, as the English race; family line; as the race of Stuart kings."

Winston (1919) p.502

"Tribe, family."

Weekley (1921) p.1190

"1. A group of individuals possessing certain physical characteristics in common and regarded as being of one blood and sprung from the same original stock; specif. a (ethnol.) a variety or division of mankind, the members of which possess certain distinctive, permanent physical characteristics in common, marking them off from others, the Negro, Mongolian, Jewish, race ... 2. a Lineage, family, descent, stock, breed: a man of ancient race..."

Universal (1932) p.955

"1. A group of persons ... having the same ancestry; as, the white race ... 2. a group regarded as one stock; as, the English race.

Thorndike (1941) p.751

"A division of mankind whose members share certain obvious physical characteristics distinguishing them from the other divisions; a stock or breed of people; a group of persons having a

common peculiarity."

Odhams (1946) p.862

"1. One of the major subdivisions of mankind, regarded as having a common origin and exhibiting a relatively constant set of physical traits.
2. Any homogeneous group of people or grouping of peoples having, or assumed to have, common characteristics; as, the Teutonic race. 3. Loosely, a nation; as, the German race. 4. A geneaological or fmaily stock; clan; as, the race of MacGregor. 5. House, pedigree; lineage; as, a noble race. 6. Any class of beings having characteristics uniting them or differentiating them from others; as, the race of lawyers."

Funk and Wagnalls (1947), p.964

"1. A group of prsons connected by common descent, blood or heredity ... 3. Ethnol. a subdivision of a stock, characterized by a more or less unique combination of physical traits that are transmitted in descent. 4. a group of tribes or peoples forming an ethnic stock."

American College (1953) p.997

"1. Group of persons connected by common descent or origin 2. a great division of mankind having certain physical peculiarities in common; the white race, the yellow race."

Thorndike-Barnhart (1955) p.639

"1. The descendants of a common ancestor; a family, tribe, people, or nation, believed or presumed to belong to the same stock; a lineage; a breed; also,

more broadly, a class or kind of individuals with common characteristics, interests, appearance, habits, or the like, as if derived from a common ancestor; as, the race of doctors, the race of birds...5. State of being one of a special people or ethnical stock; hence, more narrowly, state of belonging to a particular group or family; also, the qualities, features, etc., resulting from this; as differences of race. 8.Ethnol. A division of mankind possessing constant traits, transmissible by descent, sufficient to characterize it as a distinct human type; a permanent variety of the genus Homo. While each race is presumably sprung from a common ancestry, there exist today few tribes or individuals of unmixed origin."

Webster's (1956) p.2048

"Group of persons ... connected by common descent; posterity of (person); house, family, tribe, or nation regarded as of common stock; distinct ethnical stock; any great division of living creatures; descend, kindred..."

Oxford (1962) p.695

"1. One of the major subdivisions of mankind, regarded as having a common origin and exhibiting a relatively constant set of physical traits ... 2. Any group of people or any grouping of people having, or assumed to have, cokmmon characteristics. 3. A nation; the German race 4. A genealogical or family stock; clan; the race of MacGregor. 5. Pedigree; lineage; of noble race.

Funk and Wagnalls (1963) p.1038

"A family, a tribe, a people."

Origins (1966) p.546

"1. A group of persons related by common descent, blood, or heredity... 3. Ethnol. a subdivision of a stock, characterized by a more or less distinctive combination of physical traits that are transmitted in descent; the Caucasian race; the Mongoloid race 4. a group of tribes or peoples forming an ethnic stock ... 10. any group, class, or kind, esp. of persons: Journalists are an interesting race."

Random House (1966) p.1184

"Family, tribe."

Klein (1967) p.1294

"1. A local geographic or global human population distinguished as a more or less distinct group by genetically tranlsmitted physical characteristics ... 3. Any group of people united or classified together on the basis of common history, nationality, or geographical distribution. 4. A geneaological line; lineage; family."

American Heritage (1969) pp.1074-5

"2a. the descendants of a common ancestor; a family, tribe, people, or nation belonging to the same stock (the impoverished scion of a noble--) b. a class or kind of individuals with common characteristics, interests, appearance, or habits as if derived from a common ancestor (the--of doctors) (the whole--

of mankind -Shak.) (the Anglo-Saxon--) (the Jewish--)... 3f. a division of mankind posessing traits that are transmissible by descent and sufficient to characterize it as a distinct human type (Caucasian--) (Mongoloid--) ...
In technical discriminations, all more or less controversial and often lending themselves to great popular misunderstanding or misuse, race is anthropological and ethnological in force, usually implying a distinct physical type with certain unchanging characteristics, as a particular color of skin or shape of skull (the Caucasian race) (the Malay race) (the Ethiopian race) although sometimes, and most controversially, other presumed common factors are chosen, as place of origin (the Nordic race) or common root language (the Aryan race). In popular use race can apply to any more or less clearly defined group thought of as a unit usually because of a common or presumed common past (the Anglo-Saxon race) (the Celtic race) (the Hebrew race)."

Webster's (1971) p.1870

"1. One of the great divisions of mankind with certain inherited physical characteristics in common (such as color of skin and hair, shape of eyes and noe) 2. a number of people related by common descent."

Oxford American (1980) p.551

"2a. a family, tribe, people, or nation belonging to the same stock; b. a class of kind of people unified by a community of interests, habits, or characteristics

(the English --)... 3c. a division of mankind possessing traits that are transmissible by descent and sufficient to characterize is as a distinct human type."

Webster's (1985) p.969

APPENDIX F

Definitions of "Kinsman," "Kinswoman", "Kin" and "Kindred"

Included are definitions in which the word "race" is used.

1. Kinsman

"A male cousin; one of the same race or blood."
Bellamy (1760)

"A man of the same race or family."
Johnson (1768)

"A man of the same race or family."
Sheridan (1790

"A man of the same race or family."
Walker (1790)

"A man of the same race or family."
Webster (1830), p. 480
Webster (1845), p. 219
Webster's (1875), p. 241
Webster's (1876), p. 410
Webster's (1936), p. 555
Webster's (1956), p. 1366
Webster's (1971), p. 1245

"A man of the same race or family."
Worcester (1846), p. 403

"A man of the same race or family."
Bolles (1847), p. 445

"A man of the same race or family; one related by blood."
Boag (1847), p. 760

"A man of the same race or family; or related by blood.
Craig (1849) v. 2, p. 26

"A man of the same race or family."
Smalley (1855), p. 219

"A man of the same kin or race with another."
Chambers (1872), p. 451

"A man of the same race or family."
Stormonth (1874), p. 308

"A man of the same kin or race with another."
Chambers (1908), p. 501

"A man of the same race or family."
Century (1911), p. 3292

"3. A person of the same race."
American College (1947), p. 673

"3. A person of the same race."
Random House (1966), p. 789

2. Kinswoman

"One of the same family or race."
Webster (1857), p. 200

3. Kin

"Relation either of consanguinity or affinity . . . . Relatives, those who are of the same race."
Johnson (1768)

"Relation of either consanguinity or affinity; relatives, those who are of the

same race."

Walker (1794)

"Of the same family; a relation; of the same race."

Barclay (1799)

"1. Relation, properly by consanguinity or blood. 2. Relatives; kindred; persons of the same race."

Webster (1830), p. 479
Webster (1845), p. 574

"Relatives; kindred; persons of the same race."

Boag (1847), p. 759

"Relation of either consanguinity or affinity; relatives; kindred; persons of the same race."

Craig (1849) v. 2, p. 24

"Born of the same parents, immediate or remote; belonging to the same ancestors; descended or produced from the same race or stock."

Every-Day (c. 1890) 187

"Relatives; persons of the same race."

Webster's (1895), p. 310

"Collectively, persons of the same race or family."

Century (1911), p. 3286

"1. Archaic. A group of persons of the same stock, race or family."

Webster's (1936), p. 553

"Archaic, a group of persons descended from a common ancestor, or constituting a family, clan, tribe or race."

American College (1947), p. 672

"A group of persons of the same stock, race or family."
Webster's (1956), p. 1363

"Synonyms: . . . family, kind, kindred, race, ..."
Funk and Wagnalls (1963), p. 701

"3. A group of persons descended from a common ancestor, or constituting a family, clan, tribe or race."
Random House (1966), p. 787

4. Kindred

"Related, or of the same race."
Bellamy (1760)

"Belonging to the same race or family."
Webster's (1936), pp. 553-54

"A body of persons related to another, or a family, tribe, or race."
American College (1947), p. 672

"Belonging to the same family or race."
Webster's (1956), p. 1364

APPENDIX G

Definitions of "Family"

Included are definitions utilizing the word race.

"Whose who live in the same house; household.... Those that descend from one common progenitor; a race; a generation."

Johnson (1768)

"An household, those who live in the same family, a class, a tribe, a race, a generation."

Ash (1775)

"Those who live in the same house, household; those descended from one common progenitor, a race, a generation, a class, a tribe...."

Sheridan (1790)

"Those who live in the same house, household; those that descended from one common progenitor, a race, a generation."

Walker (1794)

"2. Those who descended from one common progenitor; a tribe or race; a kindred; lineage."

Webster (1830) p. 328
Webster (1854) p. 391

"A household; a race; a generation."

Reid (1846) p. 157

"Persons collectively who live together in the house; ... Those who descend from one common progenitor; a race; a generation."

Worcester (1846) p.269

"Those who live in the same house; household; those that descended from one common progenitor; a race; a generation."

Bolles (1847) p. 302

"Those who descend from one common progenitor; a tribe or race; kindred; lineage."

Boag (1847) p. 521

"Those who descend from one common progenitor; a tribe or race; kindred; lineage."

Craig (1849) v. lip. 713

"Household; race; generation; class."

Smalley (1855) p.143

"A household; descendants from one common progenitor; race; lineage."

Stormonth (1874) p. 199

"2. A tribe or race; kindred."

Webster's (1875) p.159
Webster's (1876) p.271

"A household; generation; race."

Johnson's (1877) p.64

"Those descended from one common progenitor; a tribe, clan, or race."

Webster's (1895) p.214

"A body of persons descended from a

common ancestor; tribe; race."
Price (1899) p.305

"The descendants of one common progenitor; race."
Chambers (1908) p.334

"In the most general sense, those who descend from a common progenitor; a tribe or race; kindred; lineage."
Century (1911) p.2133

"A body of persons descended from a common ancestor; tribe; race; genealogy."
Webster's (1913) p.318

"A body of persons descended from a common ancestor; tribe; race."
Winston (1919) p.221

"All descendants of a common ancestor, house, lineage ....; race, a group of people from common stock."
Oxford (1923) p.294

"2.a. Those descended from a common progenitor; a tribe, clan or race; kindred."
Webster's (1936) p.361

"5. Group of related people; tribe; clan; race."
Thorndike (1941) p.336

"3. A succession of persons connected by blood, name, etc.; a house; line, clan; tribe; race."
Funk & Wagnalls (1947) p.423

"3.a. Those descended (really or

putatively) from a common progenitor; a tribe, clan or race; kindred; house; as, the family of Abraham."

Webster's (1956) p.916

"4. A succession of persons connected by blood, name, etc.; a house; line; clan; tribe; race."

Funk & Wagnalls (1963) p.457

APPENDIX H

Definitions of "Lineage"

Included are those definitions utilizing the word race.

"Flock or race."
Martin (1754)

"A race, flock, pedigree."
Bellamy (1760)

"Race; progeny; family."
Johnson (1768)
Fenning (1775)
Sheridan (1790)
Barclay (1799)
Reid (1846) p.245
Smalley (1855) p.229

"Race, stock, pedigree."
Bailey (1770)

"A race, a progeny, the pedigree of a family."
Ash (1775)

"Race; progeny; descendants in a line from a common progenitor."
Webster's (1830) p.499
Webster's (1876) p.429

"Race; house; generation; progeny."
Worcester (1846) p.421

"Race; progeny; family; ascending or

descending."

Bolles (1847) p.461
Craig (1849) p.81

"Race; progeny; descendants in a line from a common progenitor."

Boag (1847) v.2 p.791

"Family line or race, either ascending or descending."

Webster (1857) p.209

"Descendants in a line from a common progenitor: race: a family."

Chambers (1872) p.471

"Descendants in a line from a common progenitor; race; progeny."

Stormonth (1874) p.326

"Race; progeny; descendants."

Webster's (1875) p.252

"A race; descent."

Wood (1875) p.167

"Family, race, progeny."

Johnson's (1877) p.105

"Family, line or race; either ascending or descending."

Every-Day (1890) p. 117

" Descent in a line from a common progenitor; race."

Webster's (1895) p.332

"Descendants in a line from a common progenitor: race; family."
Chambers (1908) p.529

"Line of descent from an ancestor; hence, family; race; stock."
Century (1911) p.3464

"Descent in a line from a common progenitor; race; family."
Webster's (1936) p. 582

"2. Family; race."
Thorndike (1941) p.542

"2. The line of descendants of a particular ancestor; family, race."
American College (1953) p.702

"2. Family; race."
Thorndike-Barnhart (1955) p.462

"Descent in a line from a common progenitor; race; family."
Webster's (1956) p.1436

"2. The line of descendants of a particular ancestor; family; race."
Random House (1966) p.833

APPENDIX I

Definitions of "Progeny"

Included are definiitons using the word "race".

"Offspring, issue, race."
Martin (1754)

"Offspring; race; generation."
Bellamy (1760)
Johnson (1768)
Sheridan (1790)

"An offspring or issue."
Bailey (1770)

"An offspring, a race, a generation."
Ash (1775)

"A race; offspring."
Fenning (1775)

"A race; offspring; generation."
Barclay (1799)

"Offspring; race; children; descendants of the human kind."
Webster (1830) p. 644

"Issue; offspring; race."
Webster (1945) p.308

"Offspring; descendants; issue; race."
Worcester (1846) p.566

"Offspring; race; generation."
Bolles (1847) p.591

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"Offspring; race; children."
Boag (1847) p.1029

"Offspring; descendants; race; children."
Craig (1849) p.45

"Offspring; descendants; issue; race."
Smalley (1855) p.361

"Descendants; children; race."
Webster (1857) p.277

"That which is brought forth; descendants; race; children."
Chambers (1872) p.625

"Offspring; race; descendants."
Stormonth (1874) p.478

"Offspring; race."
Wood (1875) p.217

"Descendants or offspring; children; race; lineage."
Webster's (1895) p.446

"That which is brought forth; descendants; race; children."
Chambers (1908) p.733

"1. Offspring; issue; specif.: a Descendants of humankind collectively; race; family; children."
Webster's (1956) p.1977

APPENDIX J

Definitions of "House"

Included are definitions utilizing the word race. Definitions of "house" in the sense in which it is used in the phrase "House of Windsor."

"3. Kindred, or race."

Martin (1754)

"6. Family of ancestors, descendants and kindred; race."

Johnson (1768)

"A family of ancestors, a race."

Ash (1775)

"A family of ancestors, descendants, and kindred, race."

Sheridan (1790)

"Family of ancestors, descendants, and kindred, race."

Walker (1794)

"Family, race, descendants, or kindred."

Barclay (1799)

"6. A family of ancestors; descendants and kindred; a race of persons from the same stock; a tribe."

Webster (1830) p. 420
Webster's (1895) p. 275

"A family; a race."

Reid (1846) p.202

"A family of ancestors, descendants and kindred; lineage; race."
Worcester (1846) p.351

"Family of ancestors; descendants and kindred; race."
Bolles (1847) p.388

"A family of ancestors; descendants and kindred; a race of persons from the same stock; a tribe."
Boag (1847) p.663

"Family of ancestors, descendants and kindred; a race of persons from the same stock; a tribe."
Craig (1849) p.948

"A family; a race; a household."
Smalley (1855)p.185

"Family or race."
Webster (1857)p.166

"3. A race; a tribe."
Webster's (1875)p.205

"4. A race of persons from the same stock; a tribe; especially, a noble or illustrious race."
Webster's (1876)p.355

"Family or race, esp. of high rank."
Price (c.1899) p.399

"A family regarded as consisting of ancestors, descendants, and kindred; a race of persons from one stock."
Century (1911) p.2901

"Family or race, especially of high rank."

Webster's (1913) p.442
Winston (1919) p.293

"5. A family of kindred; esp., a noble family or illustrious race; as, the House of Windsor."

Webster's (1936) p.482

"A group of persons descended from the same stock; specifically, an illustrious race or dynasty."

Funk and Wagnalls (1947) p.573

"5. A family of ancestors, descendants, and kindred; a race of persons from the same stock; a tribe; esp. a noble family or an illustrious race; as the house of Hanover."

Webster's (1956) p.1207

"4 ...b: a family of ancestors, descendants, and kindred: a race of persons from the same stock; esp.: a noble family . . . ."

Webster's (1971) p.1098

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APPENDIX K

Definitions of "Gypsy"

Included are definitions using the word race.

"The Gipsys are a race of vagabonds which infest Europe, Africa and Asia, strolling about and subsisting mostly by theft, robbery and fortune telling."
Webster (1830) p.376
Boag (1847) p.594

"One of a race of vagabonds supposed to have come originally from India."
Reid (1846) p.182

"A word corrupted from Egyptians, and applied to a wandering race of people found in many countries in Europe."
Worcester (1846) p.326

"One of the Moultanee race wandering in Europe."
Clark (1855) p.168

"(lit.) Egyptian, because supposed to have come from Egypt; one of a wandering race, originally from India, now found in most countries in Europe."
Chambers (1872) p.367

"A wandering race of people found in almost every European country, supposed to have come from India, through Egypt."
Stormonth (1874) p.229

"One of a vagabond race, originally coming from India."

Wood (1875) p.131
Webster's (1875) p.193

"One of a vagabond race, coming originally from India, and now scattered over Europe, living by theft, fortune-telling, tinkering, etc."

Webster's (1876) p.332

"One of a wandering, dark-skinned, and dark-eyed race, of Eastern, probably Hindu, origin."

Price (c.1899) p.354
Webster's (1913) p.371

"One of a wandering race, originally from India, now scattered Europe."

Chambers (1908) pp.385-88

"One of a peculiar vagabond race which appeared in England for the first time about the beginning of the sixteenth century."

Century (1911) p.2518

"One of a race of wanderers."

Winston (1919) p.273

"Member of a wandering race . . . of Hindu origin with dark skin and dark hair, living by basket-making, horse-dealing, fortune-telling,etc."

Oxford (1923) p. 348

"Member of a nomadic race of Indian origin,inhabiting many parts of Europe, Asia, etc."

Universal (1932) p.483

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"1... one of a Caucasian race, coming originally from India."
Webster's (1936) p.445

"A member of a wandering race of people of Indian origin."
Odham's (1946) p.483

"One of a nomadic Caucasian minority race of Hindu origin."
American College (1953) p.541

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Nos. 85-2156 & 85-2169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,
v.
JOHN WILLIAM COBB, *et al.*,
Respondents.

SAINT FRANCIS COLLEGE, *et al.*,
Petitioners,
v.
MAJID GHAIDAN AL-KHAZRAJI,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Third Circuits

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN JEWISH COMMITTEE, THE AMERICAN CIVIL LIBERTIES UNION, THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS, THE JEWISH WAR VETERANS, THE INSTITUTE OF JEWISH LAW, AND THE CAPITAL LEGAL COUNCIL OF B'NAI B'RITH AS AMICI CURIAE SUPPORTING PETITIONERS SHAARE TEFILA CONGREGATION, ET AL., AND RESPONDENT MAJID GHAIDAN AL-KHAZRAJI

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MOTION OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN JEWISH COMMITTEE, THE AMERICAN CIVIL LIBERTIES UNION, THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS, THE JEWISH WAR VETERANS, THE INSTITUTE OF JEWISH LAW, AND THE CAPITAL LEGAL COUNCIL OF B'NAI B'RITH FOR LEAVE TO FILE A BRIEF AMICI CURIAE

The Anti-Defamation League of B'nai B'rith, the National Association for the Advancement of Colored People, the American Jewish Committee, the American Civil Liberties Union, the International Network of Children of Jewish Holocaust Survivors, the American Gathering and Federation of Jewish Holocaust Survivors, the Jewish War Veterans, the Institute of Jewish Law, and the Capital Legal Council of B'nai B'rith, pursuant to Rule 36.3, hereby move for leave to file the attached brief *amici curiae* supporting the petitioners in *Shaare Tefila Congregation* v. *Cobb*, No. 85-2156, and the respondent in *Saint Francis College v. Al-Khazraji*, No. 85-2169. Consent to file this brief has been obtained from counsel for all parties to No. 85-2169; letters expressing that consent have been lodged with the Clerk of the Court. With respect to No. 85-2156, consent to file the brief has been obtained from all of the petitioners and from the only respondent who has entered an appearance in this Court; letters expressing such consent have been filed with the Clerk of this Court. Because the *amici* have been unable to obtain consent from the remaining respondents in No. 85-2156, most of whom could not be located, this motion is necessary.

The background and concerns of the *amici* are fully set forth in the Interest of *Amici Curiae* section of the attached brief. In sum, the Anti-Defamation League, the NAACP, the Lawyers' Committee for Civil Rights Under Law, the American Jewish Committee, and the American Civil Liberties Union have sought for several decades to promote good will and mutual understanding among all Americans and to combat racial and religious prejudice in the United States. Over the years, each organization has appeared frequently before this Court as *amicus curiae* to advance constructions of the constitution and federal civil rights laws that would ensure appropriate federal remedies for victims of racial, religious, and other forms of discrimination. The International Network and the American Gathering are organizations of Jewish

survivors of the Nazi holocaust and their children. The Jewish War Veterans is comprised of Jewish individuals who have served in the American armed forces. The Institute of Jewish Law is concerned with research and scholarship in the field of Jewish legal studies. The Capital Legal Council of B'nai B'rith is comprised of Jewish members of the bench, bar, and related professions.

The *amici* believe that this Court should confirm the rule of law that extends to Arabs, Jews, and other minority and ethnic group members the remedies provided in section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982. The *amici* organizations and their members bring to the issues raised in this case perspectives and experiences that are broader than and different from those of the parties. On October 6, 1986, many of these *amici* were granted leave to file a brief, and did file a brief, urging that *certiorari* be granted in No. 85-2156. The *amici* now respectfully seek the Court's leave to file the attached brief on the merits.

Respectfully submitted,

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QUESTION PRESENTED

Whether Arabs, Jews, and other minority group members who do not belong to distinct "non-white races," but who are the victims of racially-motivated discrimination, are entitled to seek relief under section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982.

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City of Greenwood v. *Peacock*, 384 U.S. 808 (1966) 8
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Delaware State College v. *Ricks*, 449 U.S. 250 (1980) 21
Erebia v. *Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 1197 (1986) 22
Ex parte Mohriez, 54 F. Supp. 941 (D. Mass. 1944) 19
Frank v. *Mangum*, 237 U.S. 309 (1915) 2
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In re Mohan Singh, 257 F. 209 (S.D. Cal. 1919) 20
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) .. 3, 8, 10, 14
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Manzanares v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979) 14, 22
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Near v. *Minnesota*, 283 U.S. 697 (1931) 18
Ortiz v. *Bank of America*, 547 F. Supp. 550 (E.D. Cal. 1982) 11, 15, 17, 22
Ramos v. *Flagship International, Inc.*, 612 F. Supp. 148 (E.D.N.Y. 1985) 22
Runyon v. *McCrary*, 427 U.S. 160 (1976) 6
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 3
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) 3, 9, 10
Tillman v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) 6, 8, 9

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United States v. *Price*, 383 U.S. 787 (1966) 10
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Woods-Drake v. *Lundy*, 667 F.2d 1198 (5th Cir. 1982) 9

Statutes and Legislative Materials:

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42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1982 ..... *passim*

Cong. Globe, 39th Cong., 1st Sess. (1866) 10, 11, 12

Miscellaneous:

G. Barton, *A Sketch of Semitic Origins* (1902) 16
J. Barzun, *Race: A Study in Superstition* (1965) 17
R. Benedict, *Race and Racism* (1942) 19
I. Berlin, *Against the Current: Essays in the History of Ideas* (1980) 18
Dickey, *Falling Out of Love with the Arabs*, NEWSWEEK, Aug. 25, 1986, at 44 16
G. Eliot, *Daniel Deronda* (1876) 18
T. Gossett, *Race: The History of An Idea in America* (1963) 15
Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975) 12, 17, 22
L. Hand, *The Spirit of Liberty* (3d ed. 1974) 18
B. Lewis, *Semites and Anti-Semites* (1986) 15, 16
S. Molnar, *Races, Types, and Ethnic Groups* (1975) 17
A. Montagu (ed.), *The Concept of Race* (1964) 14, 17
A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* (5th ed. 1974) 18
Newell, *Arab Bashing in America*, NEWSWEEK, Jan. 20, 1986, at 21 16
Note, *Legal Definition of Race*, 3 RACE REL. L. REP. 571 (1958) 20

TABLE OF AUTHORITIES—Continued

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Note, *National Origin Discrimination Under Section 1981*, 51 FORDHAM L. REV. 919 (1983) 11, 22
M. Schappes (ed.), *A Documentary History of the Jews in the United States* (3d ed. 1971) 18
N. Webster, *An American Dictionary of the English Language* (C. Goodrich rev. Springfield, Mass. 1860) 12, 18
Webster's Third New International Dictionary (1981) 17, 18
J. Worcester, *A Universal and Critical Dictionary of the English Language* (Boston, Mass. 1874) .. 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 85-2156 & 85-2169

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

SAINT FRANCIS COLLEGE, *et al.*,
Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Third Circuits

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BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN JEWISH COMMITTEE, THE AMERICAN CIVIL LIBERTIES UNION, T INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS, THE JEWISH WAR VETERANS, THE INSTITUTE OF JEWISH LAW, AND THE CAPITAL LEGAL COUNCIL OF B'NAI B'RITH AS AMICI CURIAE SUPPORTING PETITIONERS SHAARE TEFILA CONGREGATION, ET AL., AND RESPONDENT MAJID GHAIDAN AL-KHAZRAJI

This brief is submitted on behalf of the Anti-Defamation League of B'nai B'rith, the National Association for the Advancement of Colored People, the Lawyers' Committee for Civil Rights Under Law, the American Jewish Committee, the American Civil Liberties Union, the International Network of Children of Jewish Holocaust Survivors, the American Gathering and Federation of Jewish Holocaust Survivors, the Jewish War Veterans, the Institute of Jewish Law, and the Capital Legal Council of B'nai B'rith in support of the petitioners in *Shaare Tefila Congregation* v. *Cobb*, No. 85-2156, and the respondent in *Saint Francis College* v. *Al-Khazraji*, No. 85-2169. The brief is being filed jointly in the two cases because they pose similar issues, as recognized by this Court's Order of October 6, 1986, setting their oral arguments in tandem.

INTEREST OF AMICI CURIAE

B'nai B'rith, which was founded in 1843, is the oldest civic service organization of Jews in this country. The Anti-Defamation League of B'nai B'rith was formed in 1913, partially in response to the virulent anti-Semitism surrounding the Atlanta trial of Leo Frank, *see Frank* v. *Mangum*, 237 U.S. 309, 349-50 (1915) (Holmes & Hughes, JJ., dissenting). Throughout its history, the Anti-Defamation League has sought, as its charter prescribes, "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." The Anti-Defamation League remains vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion, or ethnic origin.

In support of these objectives, the Anti-Defamation League has for several decades filed *amicus curiae* briefs in this and other courts. These briefs, including several

dealing with the statute at issue in this case, have, as appropriate, urged the unconstitutionality or illegality of racially-discriminatory laws and practices and the provision of appropriate federal remedies to victims of such discrimination. *See, e.g., Bob Jones University* v. *United States*, 461 U.S. 574 (1983); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Brown* v. *Board of Education*, 347 U.S. 483 (1964); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

The Anti-Defamation League's interest in these cases arises both from its general goals of promoting and securing tolerance and equal justice and from its history of fighting anti-Semitic hatred and violence. The Fourth Circuit decision in the *Shaare Tefila* case, if left standing, would deprive victims of anti-Semitic conduct of an important federal civil rights remedy. Moreover, the rule articulated in that decision would bar this essential remedy to members of many other minority or ethnic groups, including Arabs such as respondent in the *Saint Francis College* case. Accordingly, the Anti-Defamation League and the other *amici* appear to urge this Court clearly to hold that section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, protects all victims of racially-motivated discrimination.

The National Association for the Advancement of Colored People is a New York non-profit corporation. Among its principal aims are the promotion of equality of rights and the eradication of caste or race prejudice among the citizens of the United States.

The Lawyers' Committee for Civil Rights Under Law is a national civil rights organization that was formed in 1963 at the request of President Kennedy to provide legal representation to blacks who were being deprived of their civil rights. The Lawyers' Committee has been ac-

tive throughout its history in pursuing legal remedies on behalf of the victims of racial discrimination.

The American Jewish Committee is a national organization, founded in 1906 and dedicated to the preservation of civil rights and harmonious relations among Americans of different backgrounds. The Committee believes that the protection of civil rights for all best secures the rights of Jewish Americans.

The American Civil Liberties Union is a non-profit membership organization dedicated to protecting the fundamental rights of the people of the United States.

The International Network of Children of Jewish Holocaust Survivors, through affiliated groups in the United States, Canada, Israel, and Europe, represents five thousand sons and daughters of European Jews who survived the Nazi holocaust. The American Gathering and Federation of Jewish Holocaust Survivors is an umbrella organization representing the interests of tens of thousands of survivors of the holocaust living in the United States.

The Jewish War Veterans, founded in 1896, is the oldest active veterans' organization in the United States. It was established to oppose anti-Semitism and to call attention to the contributions of Jews to American military history.

The Institute of Jewish Law, an organization affiliated with Touro College Jacob D. Fuchsberg Law Center, was founded in 1980 to facilitate research and scholarship in the field of Jewish legal studies.

The Capital Legal Council of B'nai B'rith is a joint unit of B'nai B'rith and B'nai B'rith Women. Composed of Jewish members of the bench, bar, and related professions, it seeks to strengthen through study and advocacy those traditional Jewish precepts—the rule of law, the freedom and dignity of the individual, and the importance of religious freedom—that are at the core of the American experiment.

SUMMARY OF ARGUMENT

These cases present the issue of whether minority and ethnic group members who do not belong to distinct "non-white races," but who allege discrimination of a racial or racist character, are entitled to invoke section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982. In one case, a Jewish congregation's lawsuit seeking relief for the admittedly racist desecration of its synagogue was dismissed because Jews are not members of a distinct "non-white" race. *Shaare Tefila Congregation*, Pet. App. A, at 7a. In the other case, the lower court expressly rejected such a narrow construction of the statute and held that an Arab alleging racially-motivated discrimination, despite his taxonomic classification as a Caucasian, could state a cause of action under the statute. *Saint Francis College*, Pet. App. at 25a-27a. Presumably because of this clear conflict, the Court granted *certiorari* and has set the cases for argument in tandem.

The controlling precedents of this Court, the legislative history of the statute, and the plain realities of racial prejudice require that the Court confirm that the Civil Rights Act of 1866 protects all victims of racial discrimination. While this Reconstruction-era statute was intended principally to protect blacks from victimization by whites, this Court previously has removed any doubt that the Act protects whites and non-whites alike from discrimination that is racial in character. Accordingly, and notwithstanding their Caucasian racial status, Arab and Jewish victims alleging racially-motivated discrimination do in fact state claims under the Civil Rights Act of 1866. Unless the plantiff's allegations are inconsistent with the notion of racial discrimination broadly construed, the plaintiff is entitled to proceed to his or her proof and, if successful, to obtain the relief provided by sections 1981 and 1982.

ARGUMENT

I. The Language and Legislative History of the Civil Rights Act of 1866 Confirm That the Statute Protects White and Non-White Minority and Ethnic Group Victims of Racially-Motivated Discrimination.

Section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, extends to "all persons" various enumerated rights on the same terms as those rights are "enjoyed by white citizens."[1] Ten years ago, this Court held unambiguously that one need not be "non-white" to invoke the statute. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976). Prompted however by *McDonald*'s dictum that the statute deals with discrimination that is racial in character, *id.*, the lower federal courts, in the intervening years, have devised numerous and conflicting tests by which the statute's coverage is withheld from or extended to various groups that may not technically qualify as distinct "non-white races." The decisions of the courts of appeals in the cases below, involving Jewish and Arab plaintiffs, reflect at least two of the different and inconsistent approaches.

The decision of the Fourth Circuit in the *Shaare Tefila* case clearly conflicts with the statute and its legislative history. That decision would require a plaintiff to

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[1] While respondent in *Saint Francis College* invoked section 1981, petitioners in *Shaare Tefila* sought relief under sections 1981 *and* 1982. Presumably because their section 1981 claim was dismissed on alternative grounds, including the one at issue here, petitioners in *Shaare Tefila* sought review only of the lower courts' disposition of their section 1982 claim. Recognizing the congruence of the statutory language, legislative history, and decided cases for purposes of resolving the question presented, this brief does not distinguish between the two sections. Sections 1981 and 1982 both originated in section 1 of the Civil Rights Act of 1866. Where, as here, the relevant language is the same in both statutes, there is "no reason to construe these sections differently." *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973); *accord*, *Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976).

establish his membership in a distinct "non-white race" in order to invoke the Act. As the discussion below confirms, the language of the statute contains no such restriction, and instead was intended to protect all victims of discriminatory conduct of a racial or racist character; Congress clearly anticipated that such conduct would be actionable when directed at members of a wide array of minority or ethnic groups.

A. *The Racial Character of the Discrimination Rather Than the Racial Status of the Plaintiff is the Focus of the Statute.*

This Court's inquiry in the first instance should focus on the language of the statute. In sweeping terms, the Act's protections are afforded to "all persons." There are no words specifically limiting the class of intended beneficiaries to members of certain races, "white" or "non-white." Indeed, the word "race" does not appear in the statute as presently codified.

Despite the apparent breadth of the Act, the Fourth Circuit panel below affirmed the dismissal of petitioners' claims because Jews are not members of a "racially distinct group" that is "commonly considered to be non-white[]." *Shaare Tefila*, Pet. App. A, at 7a. The unarticulated rationale must have been that because Jews are "white," they cannot suffer discrimination cognizable under the statute at the hands of other whites. As the majority and concurring opinions of the Third Circuit panel in *Saint Francis College* demonstrate, the statute and this Court's prior constructions of the statute will not allow such a limited reading. Pet. App. at 23a-24a; *id.* at 31a-32a (Adams, J., concurring).

In *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court considered whether white persons alleging that they had suffered discrimination resulting from favoritism to blacks could invoke the

statute. Construing the same statutory language—"all persons" entitled to the same rights "enjoyed by white citizens"—the Court squarely held that one need not be "non-white" to state a claim under the statute. *Id.* at 287.

The Court in *McDonald* emphasized that "the statute explicity applies to '*all* persons' (emphasis added), including white persons." *Id.* (emphasis and parenthetical in original). The statute's qualifying phrase—"as is enjoyed by white citizens"—was designed not to limit the statute's applicability to non-whites, but rather "to emphasize the racial character of the rights being protected." *Id.* (quoting *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966)). *Rachel*, upon which the Court relied in *McDonald*, and its companion case, *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), decided under the removal provisions of the 1866 Civil Rights Act, involved state criminal prosecutions of groups of civil rights workers. As in *McDonald*, the Court considered the nature of the conduct, not the race of the person alleging discrimination, in determining the availability of the federal remedy. *Rachel*, 384 U.S. at 791, 805.

This Court adopted precisely the same construction—one stressing the character of the rights being protected, rather than the "race" of the plaintiff—in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), where the Court pointed out that "*all* racially motivated deprivations of the rights enumerated in the statute" are covered. *Id.* at 426 (emphasis in original). Indeed, once one accepts *McDonald*'s holding that whites and non-whites alike can invoke the statute, racial *status* should become largely irrelevant; racial motivation and character should become the central issues. This conclusion is also supported by the consistent line of cases permitting a white associating with a black to seek relief under the statute for discriminatory conduct motivated by that association. *See Tillman* v. *Wheaton-Haven Recreation*

Ass'n, 410 U.S. 431, 434 (1973); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *Woods-Drake* v. *Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982). In such cases, the plaintiff's claim is based not on his or her racial status, but on the racial character of the rights protected.

The panel in *Shaare Tefila* disregarded the holdings of this Court and refused to consider the racial character of the conduct and rights involved. Instead, looking solely at the "race" of the plaintiffs, it held that since Jews are not "non-whites," no cause of action possibly could be stated. But given the uncontradicted admissions that the defendants in *Shaare Tefila* acted upon a belief that their Jewish victims belonged to a distinct and inferior non-white race,[2] a cause of action premised on the established racial character of defendants' conduct was stated under this Court's holding in *McDonald*.[3] As the panel in *Saint Francis College* recognized, the statute does not require a plaintiff to prove his "racial pedigree," but rather to allege that his membership in a distinct group has subjected him to "racially-based" prejudice. Pet. App. at 26a. This Court should reverse the Fourth Circuit's decision and reaffirm that neither the statute nor this Court's prior decisions require a section 1981 or 1982 plaintiff to establish membership in a distinct "non-white" race.

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[2] *See Shaare Tefila*, Pet. App. A, at 12a-13a (Wilkinson, J., dissenting); Brief for Appellees at 5, *Shaare Tefila* v. *Cobb* (4th Cir. 1986).

[3] The "racial character" of alleged discrimination may be pleaded in a variety of ways, and could include allegations of racial animosity on the part of the defendants, plaintiff's membership in a group perceived to constitute a "race" or that is typically subject to prejudice with racial overtones, or by other assertions that suggest racial or racist conduct. The types of allegations that would satisfy a "racial character" requirement are explored more fully in Part III, *infra*.

B. *The Statute Was Intended to be Construed Broadly and to Protect Minority and Ethnic Group Members Regardless of Whether They Belong to Distinct Non-White Races.*

This Court has repeatedly emphasized that the Civil Rights Act of 1866 should be generously applied and it has insisted that " 'ingenious analytical instruments' . . . [not be employed] to carve . . . exception[s]" from the statute. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)).[4] The *McDonald* Court rejected such an "analytical instrument" when it determined to emphasize the "racial character" of the rights and conduct involved, rather than the racial status of the plaintiff. In giving content to this concept of "racial character" and determining the rights Congress intended to protect under sections 1981 and 1982, the Act should be construed broadly. The propriety of such a broad construction is clearly justified by the legislative history of the statute, which demonstrates that the concept of "race" as understood and used by the 39th Congress was meant to encompass a far broader range of groups than just the "non-whites" protected by the Fourth Circuit below.

Introducing the Civil Rights Act of 1866, Senator Trumbull described the bill as intended "to protect all persons in the United States in their civil rights" and emphasized that it applied to "every race and color." Cong. Globe, 39th Cong., 1st Sess. 211 (1866). Representative Wilson, Chairman of the House Judiciary Committee and the bill's floor manager in the House, stressed that the measure would "protect our citizens, from the

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[4] *See City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981) (statute's language to be "broadly construed"); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) ("narrow construction of the language . . . would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded").

highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." *Id.* at 1118.

While there can be no doubt that the Act was intended primarily to protect the rights of blacks, it is likewise clear that Congress did *not* intend to limit "race" by a color-based definition. In overriding President Johnson's veto of the Act, Congress reaffirmed that:

> "This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any *class or creed, or race or color*, but in the great future that awaits us will, if it become a law, *protect every citizen, including the millions of people of foreign birth who will flock to our shores* to become citizens and to find here a land of liberty and law."

Id. at 1833 (emphasis supplied). As this passage demonstrates, sections 1981 and 1982 were never intended by Congress to apply solely to non-whites, but rather, as the statute provides, to "all persons." [5]

The term "race," as used in the debates, was meant to be given a broad meaning so that it would encompass every "class or creed, or race or color." *Id.* This broad meaning is evident in Representative Shallabarger's statement:

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[5] In an extended analysis of the statute's legislative history, this Court observed in *McDonald* that the Act "was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as non-whites." 427 U.S. at 289. After examining the background of the statute's enactment, one district court recently concluded that "the legislative history indicates that (perhaps except for distinctions based on gender and age) Congress intended to ensure that all citizens were to enjoy the same civil rights." *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 555 (E.D. Cal. 1982); *see also* Note, *National Origin Discrimination Under Section 1981*, 51 FORDHAM L. REV. 919, 934 & n.104 (1983) (indicating that Congress intended gender and age to be the only limitations on the statute's scope).

> "Who will say that Ohio can pass a law enacting that no man of the German race, and whom the United States has made a citizen of the United States, shall ever own any property in Ohio . . . . If Ohio may pass such a law, and exclude a German citizen . . . because he is of the German nationality or race, then . . . you have the spectacle of an American citizen admitted to all its high privileges and entitled to the protection of his Government . . . and yet that citizen is not entitled to either contract, inherit, own property, work, or live upon a single spot of the Republic, nor to breathe its air."

Id. at 1294; *see also id.* at 1757 (noting President Johnson's objection that the bill would make citizens of "Chinese and Gypsies").

The legislative history of the statute, including the generalized comments in that history about members of different "races," must also be read in light of the common understanding of the term "race" at the time.[6] A leading contemporary dictionary defined "race" as follows: "A race is the series of descendants indefinitely. Thus all mankind are called the *race* of Adam; the Israelites are of the *race* of Abraham and Jacob." N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) (emphasis in original). This sweeping contemporaneous understanding of "race" confirms that all types of groups were intended to benefit from the Act.

This Court should embrace that common and broad understanding of "race," not only because it conforms to the legislative history context, but because it is the correct and traditional method of interpreting the statute. In addressing the meaning of racial terminology, this Court has previously noted:

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[6] At least one of the opponents of the Act noted during floor debate the imprecise and potentially boundless meaning of "race." *See* Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 672 (1975).

> "It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken."

United States v. *Bhagat Singh Thind*, 261 U.S. 204, 209 (1923); *see also Morrison* v. *California*, 291 U.S. 82, 85-86 (1934). Against this background, the legislative history demonstrates that any "scientific" limitation of the Act to distinct "non-white races" would be ill-founded.

The Civil Rights Act of 1866 was adopted against the background of sectional conflict by men who had seen the Nation's future threatened by issues of race and status. They were determined that, henceforth, "all persons" would be relieved of disabilities and harm by reason of any involuntary status attributed to ancestry, physiognomy, or ethnicity. Knowing well the dangers of group antagonism, they sought safety for the Nation by declaring that no American could be treated as an alien subject to intimidation, suppression, or expulsion from the civic community. The Civil Rights Act of 1866 must be read to have a reach as broad as this purpose.

II. Federal Remedies for Racially-Discriminatory Conduct Should Not be Limited by Narrow and Arbitrary Definitions of "Race."

The Fourth Circuit panel below—despite the uncontradicted evidence of the racist character of the synagogue desecration—dismissed petitioners' claims because Jews do not belong to a distinct "non-white" race. *Shaare Tefila*, Pet. App. A, at 7a. The panel determined that the defendants' belief that Jews are members of a

separate and inferior "race" was unfounded and hence held that their conduct could not be actionable as racial discrimination. In essence, the lower court purported to "excuse" defendants' admitted racism because defendants' racist conduct lacked a sound scientific basis. Such a narrow interpretation of the statute's scope both ignores the true character of racism and illustrates the inappropriateness of restrictive judicial definitions of race.[7]

Judge Seth, in considering the applicability of the statute to minority groups, aptly observed that racists are "poor anthropologists" and that racial "[p]rejudice . . . . is based on all the mistaken concepts of 'race.'" *Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979); *see also Shaare Tefila*, Pet. App. A, at 11a (Wilkinson, J., dissenting); S. Washburn, *The Study of Race*, in *The Concept of Race* 243, 254 (A. Montagu ed. 1964). This connection between misbegotten notions of race and racial prejudice is a commonplace. But such misbegotten notions must not be ignored if the statute is to apply to "*all* racially motivated deprivations of . . . rights," *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis in original).

On the theory that defendants' "subjective, irrational perceptions" that Jews are a race should not be controlling, the Fourth Circuit panel below refused to permit the plaintiffs to invoke the statute. *Shaare Tefila*, Pet. App. A, at 7a. This holding not only clashes with this Court's recognition that the statute applies to "*all* racially motivated" conduct; it also ignores the fact that anti-Semitism has long been the product of such racial misperceptions. The racist motivations of defendants in

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[7] The *amici* reject the notion that Arabs or Jews should be classified as members of a distinct "race," but, as made clear throughout this brief, submit that the statute must be construed to cover acts of racism against Arabs and Jews.

Shaare Tefila are similar to the motivations that have animated anti-Semitic conduct for centuries.

A recent study of the character of anti-Semitism observed that:

> "In medieval times hostility to the Jew, whatever its underlying social or psychological motivations, was defined primarily in religious terms. From the fifteenth century onward this was no longer true, and Jew hatred was redefined, becoming at first partly, and then, at least in theory, wholly racial."

B. Lewis, *Semites and Anti-Semites* 81 (1986). The predominantly racist content of anti-Semitism, from at least the time of the Spanish Inquisition through Nazi Germany to present-day America, is a matter of historical record. *See id.* at 26-33, 81-100; T. Gossett, *Race: The History of an Idea in America* 9-12, 292-93, 371-72, 449 (1963); *see also Shaare Tefila*, Pet. App. A, at 16a-17a (Wilkinson, J., dissenting); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 (E.D. Cal. 1982). Six million Jews were not murdered in the holocaust as a result of differences in religious doctrine; they were the victims of a twisted and avowedly racist Nazi ideology that measured Jewishness by blood rather than belief. Hence, application of the statute to Jews would not require a court to indulge the isolated racist idiosyncracies of individual defendants. The history of anti-Semitism amply, if not tragically, demonstrates its pervasive racist character.

Similarly, discrimination against Arabs has long assumed a decidedly racist cast. Arabs include natives of Near Eastern countries such as Syria, Egypt, Yemen, Lebanon, Iraq, and Saudi Arabia, and their descendants. Though Arabs are taxonomically classified as Caucasian, they often (though certainly not invariably) have a skin color darker than that of Caucasians of European descent. Bigots have seized upon Arabs' supposedly distinctive physical and ethnic qualities in stereotyping and discriminating against them. Examples of explicitly racist

anti-Arab epithets and conduct have surfaced with dismaying frequency in recent years.[8]

An obvious irony of the consolidation of these cases is that both Jews and Arabs fall within the crude rubric "Semite," which technically is a language classification, though it also has long had racial connotations. *See* G. Barton, *A Sketch of Semitic Origins* 28 (1902); B. Lewis, *Semites and Anti-Semites* 44-45, 50 (1986).[9] Racists, among others, have lumped Arab and Jew together as targets of discrimination. For example, a restrictive land covenant successfully challenged in the early 1970's forbade transfer " 'to any person of the Semitic *race*, blood or origin, which racial description shall be deemed to include Armenians, Jews, Hebrews, Persians and Syrians. . . .' " *Mayers* v. *Ridley*, 465 F.2d 630, 631 n.2 (D.C. Cir. 1972) (emphasis supplied). It is clear that bigots have historically treated Jews and Arabs—sometimes separately, sometimes together—as racially distinct from the "white" majority.

The test of the Fourth Circuit, which requires proof of *actual* membership in a separate "non-white" race, ignores the fact that discrimination against Caucasian sub-groups such as Arabs and Jews frequently assumes an undeniably racist quality. Racially-motivated discrimination against Arabs and Jews is no different in kind or character from the bigotry directed at taxonomically-

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[8] *See, e.g.*, Dickey, *Falling Out of Love with the Arabs*, NEWSWEEK, Aug. 25, 1986, at 44 (describing a recent "surge of anti-Arab jingoism [and] increasing bigoted talk about 'camel jockeys' and 'sand niggers' "); Newell, *Arab-Bashing in America*, NEWSWEEK, Jan. 20, 1986, at 21.

[9] *See also* J. Worcester, *A Universal and Critical Dictionary of the English Language* 656 (Boston, Mass. 1874) (defining "Shemitic" as relating to various languages, including Arabic and Hebrew; defining "Shemitism" as "[t]he Shemitic race"). The term "Shemite" preceded that of "Semite," and is traceable to Shem, one of Noah's sons and the mythological forebear of the Shemites.

defined racial minorities. Adoption of a scientific "race test" would thus deny real victims of racist conduct an important remedy.[10]

Even if a "race test" arguably were appropriate for determining eligibility to invoke the Act, a restrictive, pseudo-scientific, color-based "race test" would be both improper and unseemly. In interpreting "race" for purposes of this civil rights law, even if the contemporary definition of race were not as broad as that at issue here, the correct approach would be to define the term and the statute as broadly as necessary to cover acts that are racial or racist in character. Both lay and scientific meanings admit to such sweeping applications.

It is commonly acknowledged that there is no definitional consensus in the scientific or academic community about "race." *See generally* A. Montagu (ed.), *The Concept of Race* (1964) (collecting various scholarly essays on topic); *see also United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 212 (1923); J. Barzun, *Race: A Study in Superstition* 203-07 (1965). Indeed, to the extent that there is agreement, it is on the proposition that the purpose of any racial classification dictates its scope and content. *See Ortiz* v. *Bank of America*, 547 F. Supp. 550, 565-67 (E.D. Cal. 1982); S. Molnar, *Races, Types, and Ethnic Groups* 13 (1975). In the lay community, "race" remains an extraordinarily open-ended concept; it is defined as broadly in today's leading dictionaries as it was over 100 years ago, when the Civil Rights Act was passed.[11]

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[10] "Since the evil at which the statutes are aimed is discrimination, the scientific validity of the discriminator's racial definition is irrelevant." Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 678 (1975). In enforcing a statute designed to remedy racist conduct, the defendants' racist misperceptions must be considered, even if they are irrational and confused.

[11] *Compare Webster's Third New International Dictionary* 1870 (1981) ("descendants of a common ancestor" or "a class or kind of

Despite the fact that Arabs and Jews should *not* be classified as scientifically distinct "races," it is nonetheless true that each group has been considered to constitute a "race." The mistaken belief that Jews belong to a separate "race" is not only held by anti-Semites; many with benign attitudes towards Jews have referred to them as a "race." *See* A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 353 (5th ed. 1974).[12] In fact, a standard dictionary in America still illustrates its definitions of "race" with unfortunate references to the "Hebrew race" and the "Jewish race." *Webster's Third New International Dictionary* 1870 (1981). *Cf.* N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) ("the Israelites are of the *race* of Abraham and Jacob") (emphasis in original).

Arabs are also popularly thought of as a separate "race." In terms that today would be regarded as racist,

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individuals with common characteristics, interests, appearance, or habits") *with* N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) ("the series of descendants indefinitely").

[12] *See, e.g., Hirabayashi* v. *United States*, 320 U.S. 81, 111 (1943) (Murphy, J., concurring) (wartime treatment of Japanese Americans "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe."); *Near* v. *Minnesota*, 283 U.S. 697, 703 (1931) (Hughes, C.J.) ("Jewish Race"); I. Berlin, *Against the Current: Essays in the History of Ideas* 274-75 (1980) (describing Disraeli's theory of the "Jewish race"); G. Eliot, *Daniel Deronda* (1876) (sympathetic 19th Century fictional treatment of Jews laced with references to the "Jewish race"); Letter from Learned Hand to Charles H. Grandgent (Nov. 14, 1922) (urging that Harvard College not impose a "limitation based upon race" to restrict admission of Jews), *reprinted in* L. Hand, *The Spirit of Liberty* 21 (3d ed. 1974); *The Sun* (New York), Sept. 19, 1870, at 2, cols. 2-3 ("The Jews are not merely a church; they are a race. . . . The Jewish race is one of the most tenacious and strongly marked in all the history of man."), *reprinted in* M. Schappes (ed.), *A Documentary History of the Jews in the United States* 541 (3d ed. 1971).

a district court opinion dating back several decades soberly analyzed the group characteristics of Arabs and concluded that "as a class they are not white" and would not have been considered "white" by the Congress that enacted this country's first naturalization statute in 1790. *In re Hassan*, 48 F. Supp. 843, 845-46 (E.D. Mich. 1942). *But see Ex parte Mohriez*, 54 F. Supp. 941 (D. Mass. 1944). The notion that Arabs constitute a distinct race is not a new or novel one. *See* R. Benedict, *Race and Racism* 13 (1942) (describing different groupings of the Arab race).

While most racial labelling is misguided, the reality is that Arabs, Jews, and many other ethnic or minority groups have been widely, though erroneously, regarded as belonging to "races." Such beliefs merely reflect the way "race" has been understood from at least the 19th Century to this day in popular and even academic parlance. In the face of such open-ended understandings of "race" and the express purpose of the statute to remedy all racially-motivated acts of discrimination, a construction of the statute that seeks to limit its coverage to scientifically-verifiable "non-white races" is a misguided enterprise. Moreover, such an abstract and restrictive reading of the statute would leave countless victims of discrimination plainly racist in character without any effective remedy. The correct result is to apply the statute to all victims of racially-motivated discrimination and to avoid formulation of a technical "race test."

A restrictive reading of the statute—one which ignores the racial motivations of defendants and the broader understandings of "race" prevalent at the time of the Act or in some modern lay usage—would require the federal courts to devise such a "scientific" definition of "race" and to assume the role of arbiter of racial classifications. It could result in unseemly judicial inquiries into the racial background of litigants and the formula-

tion of artificial and technical racial distinctions.[13] The breadth of the statute, however, renders such a definitional role unnecessary because of its sweeping prohibition of all racially-motivated discrimination. This Court therefore should reject the color-based, "scientific" test of the Fourth Circuit panel below and make it clear that a plaintiff need not "prove his [racial] pedigree," *Saint Francis College*, Pet. App. at 26a, before he is permitted to invoke a statute that by its terms protects "all persons."

III. Section 1981 and 1982 Plaintiffs Should be Permitted to Proceed With Their Claims Unless Their Allegations Are Clearly Inconsistent With the Possibility That They Were the Victims of Racial Discrimination.

The central flaw of the Fourth Circuit's decision in *Shaare Tefila* is that it dismissed the Congregation's claim in the teeth of allegations of conduct that was unmistakably racial or racist in character. The defendants conceded that they believed Jews to constitute a separate and inferior non-white race. They desecrated plaintiffs' synagogue with anti-Semitic emblems redolent of racially-inspired Jew hatred. Moreover, Jews, though members of a religion, for centuries and to this day commonly have been thought of, albeit mistakenly, as a separate "race."

The correct rule of law at the pleading stage should be that allegations which, if proven, would establish discrimination that is racial in character are adequate to state a cause of action. In light of the purpose of the

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[13] *See* Note, *Legal Definition of Race*, 3 RACE REL. L. REP. 571 (1958) (reviewing statutory definitions of racial groups and judicial interpretations thereof, particularly as applied in the miscegenation context); *compare United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 209-15 (1923) (high caste Hindu not a "free white person" for naturalization purposes) *with In re Mohan Singh*, 257 F. 209 (S.D. Cal. 1919) (reaching opposite result apparently undermined by the *Thind* case).

statute to combat racial discrimination in its various forms and the open-ended and imprecise meanings of "race" since 1866, it would be improper to screen potential plaintiffs by requiring allegations of membership in a "non-white race." The better approach would be to require only allegations of discrimination of a racial character.[14]

There are numerous factors—none of which is exclusive—that the courts should consider in determining whether a plaintiff has adequately pleaded and can plausibly assert that he was the victim of *racial* discrimination, as opposed to discrimination on some other basis not prohibited by the statute. The factors to be considered should include the plaintiff's allegations concerning the racial or racist motivations of the defendant. In addition, the court should weigh the plaintiff's allegations regarding his own race or skin color. Equally important factors are the extent to which the plaintiff belongs to an identifiable group that is commonly or historically regarded by bigots or lay persons as constituting a "race," as the term is understood in a broad sense. Unless the plaintiff's allegations are inconsistent with the notion that he or she has suffered discrimination that is racial or racist in character, a cause of action has been stated and the plaintiff should be entitled to prove his or her claim.[15]

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[14] Because the Arab and Jewish plaintiffs in these cases allege racial discrimination, the Court need not determine the extent to which the statute protects individuals claiming discrimination *solely* on the basis of national origin, *cf. Delaware State College* v. *Ricks*, 449 U.S. 250, 256 n. 6 (1980) (reserving question), or some other criterion.

[15] Numerous courts and commentators endorse an approach that goes beyond the "scientific" racial status of the plaintiff and includes inquiry into one or more additional factors, such as those described above, that are relevant to the racial character of discriminatory conduct. *See Alizadeh* v. *Safeway Stores, Inc.*, 802 F.2d 111, 114-15 (5th Cir. 1986); *Saint Francis College*, Pet. App. at

The test proposed is flexible and directs the court's attention to any and all factors relevant to the existence of racial discrimination. It recognizes that the racial status of the victim is not the only measure of racism. This test would also relieve the courts of the impossible and unseemly task of analyzing in a pseudo-scientific fashion the "races" of litigants. In short, it would acknowledge the true nature of racism and afford the statute's protection to all victims of racial discrimination. By any measure, the Arab and Jewish plaintiffs in these cases have pleaded discrimination that is racial in character.

CONCLUSION

For the foregoing reasons, the *amici* urge this Court to reverse the decision of the Fourth Circuit below, to affirm the ruling of the Third Circuit below, and to resolve these cases in a manner making clear that the Civil Rights Act of 1866 is available to all Arab and Jewish victims of racial discrimination.

25a-27a; *Erebia* v. *Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1253-54 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1197 (1986); *Ramos* v. *Flagship International, Inc.*, 612 F. Supp. 148, 151 (E.D.N.Y. 1985); Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975). Other authorities maintain that there is no "racial" requirement and that virtually any victim of group-based discrimination may invoke the Act. *See Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971-72 (10th Cir. 1979); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 568 (E.D. Cal. 1982); Note, *National Origin Discrimination Under Section 1981*, 51 FORDHAM L. REV. 919, 939, 942 (1983).

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Nos. 85-2169 & 85-2156

IN THE

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OCTOBER TERM, 1986

SAINT FRANCIS COLLEGE, *et al.*,
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v.
MAJID GHAIDAN AL-KHAZRAJI,
Respondent.

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,
v.
JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Fourth Circuits

MOTION FOR LEAVE TO FILE, AND BRIEF OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AS AMICUS CURIAE SUPPORTING RESPONDENT MAJID GHAIDAN AL-KHAZRAJI AND PETITIONERS SHAARE TEFILA CONGREGATION, ET AL.

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On Writs of Certiorari to the United States Courts of Appeals for the Third and Fourth Circuits

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MOTION OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American-Arab Anti-Discrimination Committee pursuant to Rule 36.2, hereby moves for leave to file the attached brief amicus curiae supporting the petition for writ of certiorari. Consent to file the brief has been obtained from all of the petitioners and from the only respondent who entered an appearance in this court, letters expressing such consent have been lodged with

the Clerk of this Court. Because the amicus has been unable to obtain consent from the remaining respondents, most of whom could not be located, this motion is necessary.

The background and concerns of the amicus are fully set forth in the Interest of Amicus Curiae section of the attached brief. In sum, the American-Arab Anti-Discrimination Committee has sought since its inception to promote mutual understanding among all Americans and to combat ethnic, racial, national origin and religious prejudice in the United States.

The amicus believes that the decision of the court below in *Shaare Tefila v. Cobb* improperly deprives Arabs, Jews and other minority group members of the protections afforded by 42 U.S.C. sections 1981 & 1982, and further compounds the confusion among the lower federal courts as to the proper scope of that statute, and that the decision of the 4th circuit in *Al-Khazraji v. Saint Francis College* represents a view of the coverage of these statutes which is more consistent with the intent of Congress and with the actual dynamics of racial discrimination.

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QUESTION PRESENTED

Whether 42 U.S.C. sections 1981 and 1982 protect Arabs, Jews and other groups, classified as "Caucasian", and not defined in terms of skin color, from discrimination based on a belief that they are racially distinct.

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"Legal Definition of Race", 3 Race Relations Law Reporter, 571 (1958)	9
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A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* (1946)	7
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B. Schlei and P. Grossman, *Employment Discrimination Law*, 2nd Ed. (1983)	12
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On Writs of Certiorari to the United States Courts of Appeals for the Third and Fourth Circuits

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BRIEF AMICUS CURIAE OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE IN SUPPORT OF RESPONDENT MAJID GHAIDAN AL-KHAZRAJI AND PETITIONERS SHAARE TEFILA CONGREGATION, ET AL.

INTEREST OF AMICUS CURIAE

The American-Arab Anti-Discrimination Committee (ADC), which was founded in 1980 to defend the civil rights of people of Arab descent and to promote their rich ethnic heritage, is a grassroots advocacy organization based in Washington, D.C. The ADC serves a national membership of Arab-Americans, joined by persons of all ethnic origins, who are committed to challenging defamation and discrimination wherever they occur.

The ADC was founded partly in response to the ABSCAM operation and similar incidents of racial stereotyping of and discrimination against Arab-Americans. The ADC works toward protecting the civil rights of all people and assuring equal treatment under the law, regardless of race, religion, national origin, sex, or any other basis of invidious discrimination.

The American-Arab Anti-Discrimination Committee's interest in these cases stems from its general goals of promoting and securing civil rights and equal justice, from its mission to fight discrimination and violence against Arab-Americans, and from its own experience as a target of such discrimination. The ADC has been the victim of several violent incidents, which the FBI believes were perpetrated by extremist groups who seek to interfere with Arab-Americans' exercise of their civil rights. Accordingly, the ADC appears as *amicus curiae* to urge this Court to hold that 42 U.S.C. sections 1981 and 1982 protect all victims of racially-motivated discrimination and violence.

SUMMARY OF ARGUMENT

These cases raise the issue of whether Arabs, Jews and other groups not defined in terms of skin color and taxonomically classified as Caucasian, but subject to discrimination on the basis of a belief that they are racially distinct groups, are protected under sections 1981 and 1982, two civil rights statutes derived from the 1866 Civil Rights Act.

Since lower courts are divided as to whether scientific classifications of race should be used in order to determine whether a particular plaintiff may state a claim under sections 1981 and 1982, or whether a broader test of racial discrimination should be used, we urge this Court to clarify this issue. A test of the coverage under these acts such as the one employed by the Third Circuit

in *Al-Khazraji v. St. Francis College*, which does not adopt a static system of racial classification is consistent with the legislative history and the previous interpretations of the statutes made by this Court. In addition, it is consistent with the purpose of the Act to ensure equal civil rights to all persons regardless of race or color.

ARGUMENT

I. The fact that an individual plaintiff is not dark in skin color or that he belongs to a group which is classified as "Caucasian" under one scientific system of racial classification should not present a barrier to stating a cause of action under sections 1981 and 1982, since these statutes prohibit all acts of discrimination which are racial in character.

No static system of racial classification can be drawn from the language and legislative history of the statute, or from the scientific, popular or legal usage of the term "race." All of these sources indicate that the concept of "race" is flexible and that classifying persons according to race should not be the basis for determining coverage under these statutes. Even assuming that such a system of racial classification could be ascertained, the public interest calls for courts to refrain from subjecting victims of discrimination to racial tests, whether based on physical characteristics, ancestry, or appearance, for the purpose of determining whether their claim can be heard. The correct standard is whether the acts of discrimination are "racial" in character, *i.e.*, whether they are based on the categorization of the victim as a member of a group sharing certain immutable characteristics.

Claims brought by Arabs, Jews and other minority groups under sections 1981 and 1982 have been dismissed by some courts as not stating a cause of action for race discrimination because such groups are not distinct "races", or because plaintiffs are not of a different skin color from defendants. The Third Circuit Court of

Appeals was correct in rejecting such arguments in the *Al-Khazraji* case. However, other courts, such as the Fourth Circuit in the *Shaare Tefila* case, have incorrectly adopted such a biologically-based notion of "race" to exclude plaintiffs who are Jews, Arabs, or members of some other group not falling within a scientifically recognized racial category from the coverage of this Act. This flies in the face of the legislative history, as well as the actual dynamics of racial discrimination, which is not based strictly on biological criteria.

This court has not previously had occasion to deal with claims brought by persons who are Caucasian, but are perceived by defendants as "non-white" or of a distinct race. However, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976), this Court construed the addition of the phrase "as is enjoyed by white citizens" in these statutes in accordance with statements in the Legislative history to have been a technical correction meant to indicate that the statute is racial in character and would not apply to discrimination against women and minors. Rep. Wilson, who proposed the amendment explained that: "It was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors.", Cong. Globe, 39th Cong., 1st Session 157 (1866). This Court further stated that the statute was not meant only to protect blacks, but to protect all persons from racial discrimination.

Lower courts which have attempted to articulate a definition of "race" for purposes of determining applicability of these statutes in cases such as *Al-Khazraji* and *Shaare Tefila* have generally found that establishing a fixed definition of race is impossible, because the groups defined as distinct races vary considerably in the scientific, popular, and legal usage of the term. There is not now and was not in 1866 anything approaching

a consensus as to the meaning of race.[1] Even if a static, scientific definition of race were accepted, intermixture of population groups and environmental factors cause changes in the physical characteristics of populations. Similarly sociological factors cause popular conceptions of race to change. Today, many anthropologists denounce the concept of race because of its use as a justification for discrimination against ethnic groups. The Nazi's use of racial stereotypes to promote the "Final Solution" made the horrible potential for misuse of racial terminology apparent.

A view which has gained some influence in the lower courts, is that coverage extends to groups who are discriminated against based on a common understanding that they are of a distinct or "nonwhite" race, and are therefore erroneously believed to share certain immutable characteristics. In view of the fact that Al-Khazraji, unlike some Arabs, is dark in skin color and alleged discrimination on this basis, the court's decision could also have been supported by cases involving Arab plaintiffs which have held this more restrictive view that only dark-skinned Arabs may state a claim under section 1981.[2] However, the Third Circuit correctly chose not to adopt such a restrictive reading.

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[1] One nineteenth century scientific system contained 29 races; another lister four. See Dictionary of Races or People, S. Doc. No. 662, 61st Cong., 3d Sess. 3 (1911)—quoted in Greenfield & Kates, "Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866", 63 California Law Review 662 (1975).

[2] See *Abdulrahim v. Gene B. Glick*, 40 FEP cases 481 (N.D. Indiana, 1981) (Plaintiff of Palestinian or Syrian origin can sue under section 1981 for race discrimination where it is alleged that his skin color is such that he can be considered "non-white"); *Saad v. Burns*, 456 F. Supp. 33 (D.D.C. 1978) (Arab plaintiff directed to file more definite statement alleging race or color discrimination under section 1981, since it is insufficient merely to state that the plaintiff is "non-Caucasian"); *Ibrahim v. New York State Department of Health*, 581 F. Supp. 228 (E.D. N.Y., 1984)

The only other case which has dealt with a claim under these statutes on the basis of discrimination against Arabs was a recent 5th Circuit case, *Alizadeh v. Safeway Stores*, 802 F.2d 111 (5th Cir. 1986) which actually involved a woman who was married to an Iranian [3] who sued her employer, because she felt that she had been discriminated against because her husband was considered non-white. The court construed this as a claim involving Arab discrimination and held that such a claim is cognizable under section 1981 where Arabs are discriminated against by people who believe that they are of a nonwhite race.

The proper inquiry, as indicated by this Court in its previous decisions, is whether the discrimination is racial in character not whether the discriminatee or the group to which he belongs is racially distinct from white persons on the basis of some objective test of race. The *Al-Khazraji* and *Alizadeh* courts are correct that looking for a scientific definition of the term "race" to determine the coverage of the 1866 Act is fruitless as there are thousands of definitions of this term. G. Simpson and J.

(court granted motion to dismiss employment discrimination claim of Arab plaintiff under section 1981 since Arabs are not a "race" for the purposes of this statute. The court implied by relying on *Saad, supra*, that an allegation of color discrimination would be sufficient to state a claim.); *Anooya v. Hilton Hotels*, 733 F.2d 48 (7th Cir. 1984) (Section 1981 held inapplicable to claim by plaintiff alleging discrimination based on his "Iraqi origin" because no allegation of racial animus was inferable from the pleadings. The Court, however, noted decisions of this Court which have indicated that race and color claims are cognizable under section 1981).

[3] Iranians are not Arab, but the court discussed the case as if it involved discrimination against Arabs. This is actually a common misperception. While it is not clear from the opinion, defendants may very well have thought that plaintiff's husband was an Arab as well. See S. Slade, "The Image of the Arab in America. Analysis of a Poll of American Attitudes" 35 Middle East Journal 143, 148 (1981). 70% of Americans who responded to a 1980 poll by a private research organization believed that Iran is an Arab country.

Yinger, Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination" (1965), indicates that biological theories of race vary from the traditional view based on skin color to endocrine theories based on the thyroid gland.[4] Popular conceptions of race are similarly subject to change.

Any test of whether plaintiffs are "racially distinct" would necessarily be based on anthropological criteria which, besides being beyond the expertise of courts, are subject to change and disagreement in the scientific community. In fact, as noted above, many anthropologists have denounced the concept of race, recognizing the danger of such concepts being used as a justification for discrimination based on the erroneous notion that genealogical and physiological "racial" distinctions can be used to rank the "races" in some kind of hierarchy of value based on "immutable" psychological and sociological characteristics attributed to the "racial" groups.[5] Ironically, it was primarily the perversion of the race concept by the Nazi Party in Germany and the tragic result of this stereotyping of Jews and other groups which led many anthropologists to abandon racial classification,[6] and yet some courts such as the Fourth Circuit in *Shaare Tefila* refuse to recognize this type of discrimination as "racial" in character, because Jews do not fit into a biologically-based definition of race. Racism is not based on an objective biological classification of the races, it is based on a perversion of scientific concepts of race

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[4] R. Tekiner, "Jewish Nationality Status as Basis for Institutionalized Racial Discrimination in Israel", 17 Arab American Affairs 79.

[5] A. Littlefield, *et al.* 2 and 3, Redefining Race: The Potential Demise of a Concept in Physical Anthropology (1982). A survey of physical anthropology texts revealed that the no-race view was most prevalent by the end of 1970.

[6] Anthropologist Ashley Montagu recommended substituting "ethnic group" for "race" because people have fixed, false ideas about the meaning of race. A. Montagu, Man's Most Dangerous Myth: The Fallacy of Race (1946).

which uses a facially objective and scientific language to disguise a value system ranking groups of people into those of higher or lesser orders.

Popular concepts of race tend to confuse biology and culture while scientific use of the term remains strictly biological. Many writers who promoted the idea of racial superiority adopted anthropological language and created the impression that anthropologists approve of attributing psychological characteristics to races even though anthropological race classifications are actually based on physical characteristics. Such writers also attached labels to races misrepresented as valid scientific terms, such as "Aryan" and "Semitic" which are actually linguistic terms.[7]

Defendants in both *Al-Khazraji* and *Shaare Tefila* argued that plaintiffs who were Arabs and Jews were barred from stating a claim of racial discrimination under sections 1981 and 1982 because both plaintiffs and defendants were "Caucasian". The system of racial classification which divides people into one of three groups, Caucasoid, Negroid, or Mongoloid, is not now and was not in 1866 the only scientific system of classifying races. There is absolutely no indication in the legislative history or in the language of the statute which suggests that Congress intended to adopt this definition of the term "race". In fact, the term "race" does not even appear in the statutes. This court has construed the "white citizens" language in the statute to merely emphasize the racial nature of the rights guaranteed. The legislative history, in fact, indicates that the bill was meant to be broader than merely a protection of the civil rights of blacks.[8]

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[7] See R. Tekiner, Jewish Nationality Status as the Basis for Institutionalized Racial Discrimination in Israel" 17 American Arab Affairs 79 (Summer 1986).

[8] Senator Trumball who introduced the bill stated that "this bill applies to white men as well as black men. It declares that all

Moreover, the term "Caucasian" has not been used with precision, it has frequently been used to refer to persons with white skin color. Some Arabs and others who would technically be classified as "Caucasian" have dark skin color, and as a result there has been much confusion over whether such "Caucasians" who are dark in skin color (like Al-Khazraji) can sue other "Caucasians" under sections 1981 and 1982.

Legal definitions of race, like scientific and popular conceptions of the term, have varied widely and skin color and membership in the Caucasian race have never been consistently applied criteria. In *Lee v. New Orleans Great Northern Railroad Co.*, 125 La. 236, 51 So. 182 (1910) in which a white plaintiff sued a railroad for damages for assigning his two daughters to a "colored" coach, the court observed that "On the question of race, there is no legal presumption either way. The issue was one purely of fact, to be determined not only by evidence of the admixture of Negro blood, but by evidence of reputation, of social reception, and of the exercise of the privileges of the white man." 51 So. at 184. In *Gong Lum v. Rice*, 139 Miss. 760, 104 So. 105 (1925), a Chinese girl was prohibited from attending a white school, under a state constitutional provision that "(s)eparate schools shall be maintained for children of the white and colored races." The court discussed the term "white" as follows: "So far as we have been able to find, the word 'white' when used in describing the race is limited strictly to the Caucasian race, while the word 'colored' is not strictly limited to Negroes or persons having Negro blood." 104 So. at 108.

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persons in the United States shall be entitled to the same civil rights . . . ." Cong. Globe, 39th Cong., 1st Sess. 599 (1866). Senator Trumball also indicated that the act would "undoubtedly" cover gypsies, a group which would also fall under the classification of "Causasian" (*id* at 498), and there was discussion of whether the "German race" would be covered, indicating that Congress did not intend to adopt this three-race system of racial classification (*id.* at 4294).

Definition of "race" in state statutes and constitutions has varied widely both in terms of the persons included within particular racial groups and the groups affected. Constitutions and statutes of a particular state may even have defined the membership of certain racial groups differently depending on the purpose for which the classifications were used, e.g., some states had different definitions of race for purposes of concubinage or miscegenation statutes and statutes requiring racially segregated facilities.[9]

Legal tests of racial classifications are also instructive in terms of determining whether racial classifications based on physical characteristics should be used by the courts to decide whether a plaintiff can state a claim under sections 1981 and 1982. Statutory definitions of race were usually based on an individual's "blood", ancestry, appearance, or a combination of these factors. Tests based on "blood" were divided into the so-called proportion or percentage test and the ascertainable trace test. Ancestry-based tests usually provided that a person should be deemed a member of a (nonwhite) racial group if he has an ancestor who was a member of that group within a specified number of generations removed. Appearance-based tests were generally used for purposes such as enforcing laws providing for segregated facilities where a quick appraisal of physical appearances was necessary.[10]

Given this confusion in the definition of "race", it should not be the touchstone of coverage under the Civil Rights Act of 1866.

II. Claims by Arab or Jewish plaintiffs should not be considered to be based on national origin or religion rather than race, as a matter of law.

An allegation of racial discrimination under section 1981 or 1982 on the basis of Arab of Jewish origin

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[9] See Legal Definition of Race, 3 Race Relations Law Reporter 571, 572.

[10] *Ibid.* at 573.

should be sufficient to survive a motion to dismiss. As demonstrated in section three below, both of these groups are subject to discrimination which is racial in character. Although national origin or religious discrimination may in some cases be so closely intertwined with race discrimination that the two are indistinguishable, whether elements of racial discrimination are present in a particular act can only be determined on a case-by-case basis.

Courts faced with employment discrimination claims by Arab plaintiffs often have erroneously viewed them as national origin claims, suitable for consideration under Title VII rather than section 1981. Similarly, there is a tendency to assume that claims brought by Jewish plaintiffs must necessarily be based on religious discrimination and so are not enforceable under §§ 1981 & 1982.

The matter of whether national origin discrimination is cognizable under sections 1981 and 1982 has not been definitively decided, although this court has indicated in dicta that it is not.[11] However, some courts have held that national origin claims are cognizable under these statutes, where there are some elements of racial discrimination.[12]

Some courts and commentators have even stated that the fact that these claims may be cognizable under

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[11] In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), this court said in dictum that section 1982 reaches only racial discrimination as distinguished from religious or national origin discrimination, and lower courts have generally held that national origin discrimination is not covered, see *e.g. Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1974) (Slavic Americans); *Kurylas v. Department of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1973) (Polish Americans).

[12] See, e.g., *Gonzales v. Stanford Applied Engineering*, 579 F.2d 1298 (9th Cir. 1979) (brown Mexican-Americans); *Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901 (W.D.Okl. 1977) (Americans of Spanish descent); *Khawaja v. Wyatt*, 495 F. Supp. 302 (W.D.N.Y. 1980) (Pakistani).

Title VII somehow has some bearing on whether a claim can be brought under section 1981. This is an erroneous argument since the issue is the intent of Congress in passing section 1981 rather than what is covered by other statutes.

It is possible that elements of both racial and national origin discrimination may exist in the same situation. It is erroneous for courts to simply assume that an Arab or a Jew can only be subject to national origin or religious discrimination. Allegations by these groups of racial discrimination should be enough to survive a motion to dismiss; the nature of the claim can only be ascertained by examining the facts of a given situation. The confusion between race and national origin is aggravated by the fact that the precise definition of "national origin" is also unclear.

Title VII, in fact, does not define the term "national origin." However, there was some discussion of the term in the legislative history. Congressman Dent (D. Pa.) stated that: "National origin, of course, has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person.[13] In *Espinoza v. Farah Manufacturing Company*, 414 U.S. 86, 6 FEP 933 (1973), in determining whether a refusal to hire on the basis of citizenship constituted a national origin claim, this court defined national origin as "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Id.* It will often be difficult to distinguish between national origin and race in particular cases since they will often be intertwined; however, a strict national origin claim is possible where a person is discriminated against solely because of the country from which he comes.

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[13] 110 Cong. Rec. 2549 (1964), quoted in Schlei and Grossman, p. 305.

Many incidents of violence and harassment directed at Arabs have occurred in response to events taking place in the Middle East such as the recent U.S. raid on Libya. Perhaps if such incidents were directed solely at Libyans, one could argue that they were based on national origin. However, every Arab and Arab-American is threatened by such senseless violence. In 1985, during the TWA hostage crisis in Lebanon, the Dar as-Salaam Mosque was severely damaged by two pipe bombs. The Islamic Society of Greater Houston, where this mosque was located, had received numerous threatening phone calls during this and other crisis situations in the Middle East. Sayed Gomah, Director of the Society, expressed his frustration at the recent Congressional subcommittee hearings on violence against Arab-Americans: "Despite our establishment in American Society as a religious entity . . . we are constantly viewed as a political entity responsible for the world's problems. When the U.S. Embassy in Tehran was taken, we were Iranians. When the Marine barracks were bombed, we were Lebanese. When the Achille Lauro was hijacked, we became Palestinian. When TWA Flight 847 was held, again we were Lebanese. Most recently, when the Gulf of Sidra became the target, we were declared Libyans." (House Committee on the Judiciary, Subcommittee on Criminal Justice, Congressional Hearings on Ethnically Motivated Violence Against Arab Americans, July 16, 1986)

As indicated by Sayed Gomah, anti-Arab discrimination is indiscriminately directed at all Arabs despite their particular national origin. As with the desecration of the Shaare Tefila synagogue, these acts are often motivated by hatred of Arabs and Jews as groups rather than by the victims' religious beliefs or practices, or national origin. The Shaare Tefila congregation was clearly not discriminated against because of their religious practices or beliefs. The 1972 amendments to Title VII added section 701(j) defining religion: "The term 'religion' includes all aspects of religious observance and practice, as

well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employee's business." The slogans painted on the synagogue clearly indicated that the perpetrators took their inspiration from the Nazi anti-Semitic attitudes based on erroneous concepts of racial inferiority. As the history of Nazi Germany proves, such feelings of hatred are not abated by religious conversion or suppression of religious practices. The Nazis attempted to identify persons with "Jewish blood" by investigating geneological records, even if such persons did not practice the Jewish religion.

III. Arabs and Jews are perceived by some people, as "racially" distinct, and have been the object of racial caricatures and steretoypes, which encourage and are used to justify discrimination. The civil rights of Arabs and Jews are endangered and will be diminished if they are not deemed to be within the protection of these statutes.

Clearly acts of discrimination against Arabs and Jews, such as those which occurred in the two instant cases are not based on some bizarre notion of race unique to the defendants. However, regardless of what precise percentage of the population holds such views, they present a palpable danger to the civil rights both of the victims and of other members of these groups, whose free exercise of their civil rights is "chilled" by the fear of racial violence, harassment, and discrimination.

Arabs and Jews have both historically been considered distinct groups or "races" and have been subject to discrimination on the basis of this perception. Both analysis of media coverage and attitude polls indicate a high frequency of stereotyping and negative images of Arabs.[14]

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[14] See S. Slade, "The Image of the Arab in America: Analysis of a Poll on American Attitudes" 35 Middle East Journal 143, 147-48 (1981). Results of a 1980 poll of American attitudes towards Arabs

In fact, the stereotypes of Arabs which are currently prevalent in the American media and society are similar to earlier stereotypical representations of Jews in Nazi Germany and elsewhere. Such attitudes indicate a climate favorable to discrimination which is racial in character.

Racism against both Arabs and Jews is often based on the erroneous linking of culture and biology.[15] Arabs and Jews both fall into the category of "Semitic," although the term "ant-Semitism" is now commonly used to designate a racist attitude against Jews. This 19th Century classification was actually linguistic, but also formed the basis for a racial theory.[16] Professor Edward Said has said that, "In the West, the Arab is frequently presented as a menace, a terrorist, a shadowy figure who

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indicates that a large percentage of Americans consider Arabs to be "barbaric/cruel" (44%), "treacherous/cunning" (49%) and "warlike/bloodthirsty" (50%). A large percentage view most Arabs as "anti-Christian" (40%). All of these traits imply hostility. In addition, Arabs, like Jews, are subject to a steretotype based on the perception that they are rich and greedy.

[15] See T. Gossett, Race, the History of an Idea in America 11 (1963).

[16] See E. Said, Orientalism (1978) documenting intellectual history of Western view of Orient—particularly Arab world—traces racist ideas against Arab world back as far as Crusades e.g. at 172 quotes Chateaubriand—Crusades not just about "deliverance of the Holy Sepulchre" but about opposition to "cult systematically favorable to ignorance (Islam); to decadance, to slavery" documents links made by philologists between linquistics and anatomy e.g. "One sees that in all things, the Semitic race appears to us to be an incomplete race, by virtue of its simplicity. This race—if I dare use the analogy—is to the Indo-European family what a pencil sketch is to a painting; it lacks that variety, that amplitude, that abundance of life which is the condition of perfectability. Like those individuals who possess so little fecundity that, after a gracious childhood, they attain only the most mediocre viriilty, the Semitic nations experienced their fullest flowering in their first age and have never been able to achieve true maturity." Renan, Oevres Complete, 8:156 quoted at E. Said, Orientalism (1978) at 159.

operates outside of the accepted value systems and is therefore to be feared and mistrusted. This racist image of the Arabs is nothing more than the result of the transference of the popular anti-semitic animus from a Jewish to an Arab target." [17] Although Jews are not biologically a separate race, the Nazi attitude towards Jews was racist in that it defined them as separate from the "Aryan" race. The Nuremberg Laws in Nazi Germany defined Jews biologically. The treatment of Jews was not based on religious practice or belief, since the Nazis sought to identify Jews who had assimilated and converted to Christianity in order to "re-judaize" them. It also was unrelated to national origin, since Jews of German ancestry were equally subject to atrocities as Jews of other national origins such as Polish, French, or Hungarian.[18]

This legacy of racism inherited from the nineteenth century, is carried over into present day views towards Arabs. "[W]hat has not been sufficiently stressed in histories of modern anti-Semitism has been the legitimation of . . . atavistic designations by Orientalism, and more

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[17] Edward Said quoted in Nick Thimmesch "The Media and the Middle East" 2 American Arab Affairs 79, 85 (Fall, 1982). Elsewhere Said discusses the dynamics of racist thought: "Theses of Oriental backwardness, degeneracy, and inequality with the West most easily associated themselves early in the nineteenth century with ideas about the biological bases of racial inequality. Thus the racial classifications found in (the works of this period) found a willing partner in latent Orientalism. To these ideas was added second-order Darwinism, which seemed to accentuate the "scientific" validity of the division of races into advanced and backward, or European-Aryan and Oriental-African. Thus the whole question of imperialism as it was debated by pro-imperialists and anti-imperialists alike, carried forward the binary typology of advanced and backward (or subject) races, cultures, and societies. E. Said, Orientalism (1978) at 207.

[18] See Greenfield and Kates, "Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866" 63 California Law Review 662, 678.

important . . . the way this academic and intellectual legitimation has persisted right through the modern age in discussion of Islam, the Arabs, or the Near Orient. For whereas it is no longer possible to write learned (or even popular) disquisitions on either "the Negro mind" or "the Jewish personality", it is perfectly possible to engage in such research as "the Islamic mind," or "the Arab character." [19] In fact, content analysis of news coverage and monitoring of television has indicated that, at least since 1956 Suez crises, American media have broadcast a predominantly negative picture of the Arab personality.[20]

Many Arabs have physical characteristics such as darker skin color which make them readily distinguishable and, therefore more vulnerable to racial discrimination. However, these exterior, visible differences become symbolic of invisible characteristics attributed to the group. Some have referred to this as "social race." These characteristics erroneously attributed to the group are the source of racial stereotypes. The social judgments and discriminatory denial of civil rights which they foster are the evils which sections 1981 and 1982 were meant to eliminate, and it is only an appreciation of this fact which can lend meaning to the statutes,[21] and allow them to fulfill the purpose expressed in the language and legislative history: to protect the civil rights of all persons regardless of race or color. In order to appreciate the inappropriateness of making color and other physical characteristics the determinants of coverage, one need only imagine the type of discrimination suffered by plaintiffs in the *Shaare Tefila* case as directed against Arabs, Hispanics or some other group referred to as a "race" whose members differ in skin color and other physical

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[19] E. Said, Orientalism (1978) at 262.

[20] *Ibid.* N. Thimmesch.

[21] *Ibid.*, Greenfield and Kates, at 679-680.

characteristics. If a mosque or Arabic cultural center were defaced with racist slogans and symbols as was the Shaare Tefila synagogue, would only those victims who can pass a test of skin color or some other physical trait be allowed access to the court in order to state their claim?

One need not merely imagine this situation, as violence and harassment of Arabs has been on the increase in recent years. In fact, the ADC has first-hand experience with this phenomenon since it has recently been a target of several violent incidents. The FBI has indicated that it believes that these and other acts of violence against Arab-Americans were motivated by anti-Arab animus. Alex Odeh, Regional Director of the ADC in Los Angeles, was murdered on October 11, 1985 when a bomb rigged to the door of the ADC office exploded as he arrived for work. In addition, on August 16, 1985 two Boston police officers were seriously injured when attempting to defuse a bomb left outside the ADC office in that city, and on November 29, 1985 the Washington, D.C. office was damaged by an arson attack. Other Arab-Americans have also been victimized by violence. Earlier this year on May 27, Professors Ismail and Lamya al-Faruqi were brutally murdered when they and their pregnant daughter were attacked at home in the middle of the night by an unknown assailant. The al-Faruqis were world renowned experts on Islamic thought and Arabic culture. The gravity of the situation is evident in the statement of FBI director William H. Webster delivered before the House Committee on the Judiciary on February 28, 1986, that the FBI considers the potential for violence by extremist groups against Arab-Americans to be quite high. On another occasion, Webster, in a speech at the National Press Club, said that Arab-Americans have entered a "zone of danger." [22]

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[22] "FBI Chief Warns Arabs of Danger", *The New York Times*, December 11, 1985, at p. A19.

Both Jews and Arabs, are victims of hate and violence. The rhetoric of extremist groups with an anti-Jewish bias, such as the Ku Klux Klan and Neo-Nazi organizations, are paralleled by that of anti-Arab extremist groups such as the Jewish Defense League and the Jewish Defense Organization. Jews and Arabs should be afforded the protection of these Civil Rights Act because they have been and are still perceived by some to be "racially" distinct groups, and because they are victimized by violence and discrimination based on this perception. How widely such views are held or how frequent the incidents of violence occur is not the point. These incidents are no less grave to their victims, and no less based on racial grounds, regardless of whether the majority of the population holds these ideas.

It has been said that a subjective test of defendant's belief that plaintiffs belong to a distinct race would open the courts to litigation based on defendant's irrational conceptions of race not tied to any common understanding of the term. In the instant cases, the racial animus in discriminating against Arabs and Jews is not derived from some unique notion concocted by defendants. In such cases, the subjective belief of defendants is connected to an external racist ideology. As discussed above, there is a perception held more widely than by these defendants that Arabs and Jews are racially distinct groups. It should not be required that the racist perceptions of the group be so common that they are shared by most people, or so acceptable that they are frequently expressed openly. An allegation of racial discrimination on the basis of the fact that plaintiff is an Arab or a Jew should be sufficient to survive a motion to dismiss. Whether or not racial discrimination has actually occurred can only be determined by a review of the facts of each individual case. Such an approach would maintain the racial standard articulated by this Court, and yet employ the standard flexibly enough to deal with the realities of racial discrimination.

CONCLUSION

For the foregoing reasons, the amicus urges the court to affirm the decision of the Third Circuit, to reverse the decision of the Fourth Circuit, and to resolve these cases in a manner such that it is clear that the protection of these statutes is available to all Arab and Jewish victims of racial discrimination.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ST. FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH, and DAVID MCMAHON, individually and in their official capacities,

Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2169

ST. FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH, and DAVID MCMAHON, individually and in their official capacities,

Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council ("EEAC"), with the written consent of all parties, respectfully submits this brief amicus curiae.[1] The

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[1] The parties' consent letters have been filed with the Clerk of the Court.

brief contends that the court of appeals overextended the reach of 42 U.S.C. § 1981, and thus supports the position of the petitioner before this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations which themselves have hundreds of members interested in the foregoing purposes. Its governing body is a Board of Directors composed of experts and specialists in the field of equal employment opportunity (EEO). Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to various federal nondiscrimination laws, including both 42 U.S.C. § 1981 (herein "Section 1981") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended. Thus, EEAC has a direct interest one of the issues presented for the Court's consideration in this case—that is, whether the court of appeals erred in extending the scope of Section 1981 to reach all discrimination based on a person's membership in

any "group that is ethnically and physiognomically distinctive." (784 F.2d at 517).

Because of its interest in such issues, EEAC has filed amicus curiae briefs in this Court in numerous other cases involving the scope and proper interpretation of the nation's laws concerning nondiscrimination in employment. *E.g.*, *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982) (Section 1981); *Great American Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979) (Section 1985(3)); *Ansonia Bd. of Educ. v. Philbrook*, 55 U.S.L.W. 4019 (U.S., November 17, 1986) (Title VII); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

The facts relevant to the issue addressed in this brief may be summarized as follows. Dr. Magid G. Al-Khazraji, a United States citizen born in Iraq, was denied tenure by St. Francis College after several years of employment on its faculty. He brought this suit in federal district court, alleging *inter alia* that the College and members of its Committee on Tenure had violated both Title VII and 42 U.S.C. § 1981 by discriminating against him because he is an Arab Muslim of Iraqi origin.

The district court dismissed the Title VII claim as time-barred. It also dismissed the Section 1981 claim, on the ground that the complaint in essence alleged discrimination on the basis of national origin and religion, not on the basis of race or alienage. In so construing the complaint, the court noted that Al-Khazraji had testified that he is a Caucasian, but of

a "different branch of the Caucasian race." (Pet. App. 37a-39a). Thus, the alleged discrimination against him was presumably carried out in favor of persons who were also Caucasians, but not Muslims or persons of Arab or Iraqi origin. The district court concluded that such alleged discrimination fell outside the Congressionally intended scope of Section 1981.

The court of appeals reversed as to the Section 1981 claim, holding that "ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them," even when the alleged discrimination is presumably in favor of "other Caucasians or whites." (784 F.2d at 514). Although the court acknowledged that Section 1981 is addressed to racial discrimination and that "other types of discrimination . . . may not be cognizable" under that statute, it construed the concept of "race" broadly to encompass membership in any "group that is ethnically and physiognomically distinctive." (784 F.2d at 517).

Judge Adams concurred in the court of appeals' decision, but expressed concern that the panel majority's broad interpretation of the coverage of Section 1981 "constitutes a dramatic expansion in the number of plaintiffs who may now proceed under the statute," since "virtually any nationality can be seen as ethnically and physiognomically distinctive." (784 F.2d at 520). He warned that this expansive definition of "race" would extend the statute "well beyond what Congress intended when it passed the law. [Footnote omitted]. In effect, a statute aimed at racial discrimination is being converted into one also focused on national origin discrimination." (*Id.*). Judge Adams felt "constrained to join the result

reached by the panel," however, because of his reading of this Court's decision in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

SUMMARY OF ARGUMENT

Section 1981 is not a comprehensive nondiscrimination law, but a limited statute dealing specifically with racial discrimination. *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409, 413 (1968); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). While it protects persons of all races against discrimination based on their race, as such (*McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)), it was not intended, and should not be interpreted, to cover allegations of discrimination based on factors other than race, as that term is commonly understood.

The standard suggested by the court below for determining the applicability of Section 1981 in any given case is unworkable. It would enmesh the district courts in the unseemly exercise of trying to determine as a threshold matter whether or not particular groups of people are "ethnically and physiognomically distinctive." As a practical matter, it would be almost impossible for a court to exclude any claim on this basis, for as Judge Adams observed in his concurring opinion, virtually every nationality can be seen as distinctive under such a test. Thus, the Third Circuit's approach would effectively bring practically every claim of discrimination based on national origin within the ambit of Section 1981.

Such was not the intent of the 1866 Congress that originally enacted Section 1981. Indeed, it was not until 1964, when it enacted Title VII, that Congress showed any concern about employment decisions

made along lines of national origin or religion. But in doing so, Congress also established specific procedures for investigation and conciliation of charges—procedures that remain unavailable under Section 1981. Thus, for the courts now to expand the scope of Section 1981 to encompass charges of discrimination that are fundamentally based on national origin would undermine the procedural scheme Congress established when it legislated against the specific type of discrimination alleged in this case. Such a judicial departure from the legislature's intent would not only be improper, but would serve no useful purpose, because Title VII provides a full and adequate remedy for discrimination based on any of the grounds alleged, without requiring the courts to draw nice lines between race, color, and national origin.

ARGUMENT

THE COURT OF APPEALS ERRED IN EXTENDING THE SCOPE OF SECTION 1981 TO REACH ALL EMPLOYMENT DISCRIMINATION BASED ON A PERSON'S MEMBERSHIP IN ANY "GROUP THAT IS ETHNICALLY AND PHYSIOGNOMICALLY DISTINCTIVE."

A. Introduction

The issue before the Court in this case is not whether "ethnic Arabs", or Muslims, or Iraqi-born Americans who have suffered discrimination in the workplace on account of these characteristics can obtain a remedy under federal law. They clearly have such a remedy under Title VII of the Civil Rights Act of 1964, which broadly prohibits discrimination based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-3(a). Thus, the plaintiff in this case had only to file a timely charge under

Title VII to be able to maintain an action against his employer for discriminating against him on any or all of the grounds he has alleged.

Nor is the issue here whether Arabs or other nationalities can ever have access to the more extensive remedies and more liberal procedures available to plaintiffs under 42 U.S.C. § 1981,[2] which provides in relevant part that:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . .

It is now settled that Section 1981 applies to private contracts of employment, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), and that it protects whites as well as non-whites against discrimination on the basis of "race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). Thus, if Dr. Al-Khazraji believed that his employer had discriminated against him in favor of a member of some different race because of an acknowledged or indisputable racial difference, he clearly could sue under Section 1981. In this regard, he stands on the same footing as any other person within the jurisdiction of the United States, white or non-white.

Instead, the question at the heart of this case is whether the scope of Section 1981's ban against racial discrimination is to be defined in terms of

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[2] Unlike Title VII claimants, plaintiffs suing under Section 1981 have generally been held to be entitled to trial by jury and to the full panoply of remedies usually available in civil suits, including punitive and compensatory damages. *Johnson v. Railway Express Agency*, 421 U.S. at 460-61.

real or perceived differences in physiognomy and ethnicity so minute and subtle that persons of virtually every nationality can invoke its protection whenever they believe an employer has favored a person of any other national or ethnic background.

Carried to its logical conclusion, the rationale of the court below raises the spectre, for example, of a plaintiff of Scandinavian descent suing under Section 1981 and demanding trial by jury and compensatory and punitive damages because his employer allegedly favored a person of Irish ancestry. In short, because practically everyone can claim identification with some nationality and because, as Judge Adams recognized in his concurring opinion, "virtually any nationality can be seen as ethnically and physiognomically distinctive" (784 F.2d at 520), the court of appeals' approach would effectively bring essentially all claims of discrimination based on national origin within the scope of Section 1981.

We submit that such an expansive interpretation of Section 1981 is unsupported by either the language or the legislative history of the 1866 Civil Rights Act, from which Section 1981 is derived. Nor is such an approach warranted by practical policy considerations, particularly because an adequate federal remedy is available under Title VII of the 1964 Civil Rights Act for claims, such as that of the plaintiff herein, which rest essentially on differences in national origin or religion rather than race or color.

B. Neither The Language Nor The Legislative History Of Section 1981 Supports Its Extension To Claims Of Discrimination Resting Essentially On Differences In National Origin Or Religion Rather Than On Differences In Race Or Color.

This Court has recognized that the statutory language defining the rights protected by Section 1981 by reference to the rights "enjoyed by white citizens" limits the scope of that section's coverage to discrimination based on race or alienage. Thus, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), in construing the identical phraseology of 42 U.S.C. § 1982, which guarantees all citizens the same right to own and convey property "as is enjoyed by white citizens," the Court declared flatly:

> [T]he statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.

In this respect, the Court in *Jones* observed, the language of Section 1982 contrasts sharply with that of the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, and makes clear that the former "is not a comprehensive open housing law." *Id.* By like token, the presence of the same language in Section 1981 makes clear that it, unlike Title VII, is not a comprehensive equal employment opportunity law, but rather a law aimed only at discrimination on specific grounds.

The Court has repeatedly recognized, moreover, that any doubt on this score is removed by reference to the legislative history of Section 1981. Thus, in *Georgia v. Rachel*, 384 U.S. 780, 791 (1966), the Court reviewed the legislative history of the 1866 Civil Rights Act, from which both Sections 1981 and

1982 are derived, and concluded that it "clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." The Court noted that the phrase "as is enjoyed by white citizens" was added to the legislation by amendment "to emphasize the racial character of the rights being protected." *Id.*, quoted in *McDonald v. Santa Fe Transportation Co.*, *supra*, 427 U.S. at 294.

Accordingly, this Court's decisions have consistently defined Section 1981's coverage exclusively in terms of discrimination based on race. *E.g.*, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975) (Section 1981 "on its face relates primarily to *racial* discrimination . . ."') (emphasis added); *Runyon v. McCrary*, 427 U.S. 160, 168 (1976) (Section 1981 "prohibits *racial* discrimination in the making and enforcement of private contracts") (emphasis added); *McDonald v. Santa Fe*, 427 U.S. at 286-87 (Section 1981 "is applicable to *racial* discrimination in private employment against white persons" as well as blacks) (emphasis added).

The Court's recognition of this limit to the scope of Section 1981 is further supported by examination of the historical context in which the legislation was passed. The Civil Rights Act of 1866 was originally enacted to enforce the Thirteenth Amendment, which abolished slavery, and to nullify the Black Codes adopted in the South following the Civil War. *Jones*, 392 U.S. at 427-28. The legislative debates are replete with references to the need to prevent discrimination based on race or color, but contain no suggestion that Congress was seeking to protect all groups that might be perceived as "ethnically and physiognomically distinctive."

To the contrary, there is no evidence whatsoever in the legislative record or in contemporaneous history that the Reconstruction Era Congress was concerned about employment decisions made along lines of national or ethnic origin, except where race or color was specifically involved. Although Congress much later banned preferences based on national origin when it enacted the Civil Rights Act of 1964, history does not support ascribing comparable breadth to the 1866 statute.

To be sure, as Judge Adams noted in his concurring opinion below (784 F.2d at 519), this Court in *McDonald v. Santa Fe* saw a broader purpose underlying Section 1981 than just the prohibition of discrimination against blacks. For example, the Court cited references in the debates to the need to protect the rights of "white men as well as black men" (427 U.S. at 291, quoting Cong. Globe, 39th Cong., 1st Sess., 599 (remarks of Sen. Trumbull)). Thus, the Court concluded in *McDonald* that whites, as well as non-whites, could sue for *racial* discrimination under Section 1981. But, contrary to Judge Adams' extension of this reasoning, it does not follow that the statute also was intended to cover discrimination that is based fundamentally on factors other than race. Rather, the Court's emphasis on the extent of the legislative concern over racial discrimination merely underscores that it was that specific evil, and not other forms of discrimination, that the 39th Congress was focusing on when it enacted Section 1981.

C. Practical Policy Considerations Favor Requiring Plaintiffs Alleging Discrimination Based Essentially On National Origin Or Religion To Proceed Under Title VII Rather Than Under Section 1981.

The divided opinions of the Third Circuit panel in this case and of the Fourth Circuit panel in *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (1986), *cert. granted*, No. 85-2156, illustrate some of the practical difficulties inherent in extending the coverage of Sections 1981 and 1982 to any and all groups that a court may regard as "ethnically and physiognomically distinctive" or that a defendant may perceive as a "racially distinct group."

The approach espoused by the Third Circuit would involve the district courts in the unseemly exercise of assessing the physiognomy of groups of people at the threshold of a Section 1981 action, to see whether they had enough facial or bodily characteristics in common to be considered "distinctive", and thus separately protected by the statute. Cf. *Sere v. Bd. of Trustees of University of Illinois*, 628 F. Supp. 1543 (N.D.Ill. 1986) (Nigerian black's claim of discrimination in favor of American blacks with lighter skin pigmentation held not actionable under Section 1981). Yet the panel majority suggested no standards for making this assessment, and it is difficult to see how legal lines could be drawn based on any types or degrees of physical distinctiveness without unduly offending members of the groups involved, or of other groups.[3] Thus, as a practical matter, the Third Cir-

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[3] Physiognomy is a nebulous concept at best. *Webster's New World Dictionary*, 2d Ed. 1980, defines it as "1. the practice of trying to judge character and mental qualities by observation of bodily, esp. facial, features 2. facial features and expression, esp. as supposedly indicative of character; the face 3. apparent characteristics; outward features or appearance."

cuit's approach would, as Judge Adams recognized in his concurrence, effectively bring virtually all claims of national origin discrimination within the ambit of Section 1981—a result directly in conflict with the intent of Congress and with this Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 413.

The approach considered and rejected by the majority of the Fourth Circuit panel in *Shaare Tefila* would be equally unworkable. It would make Section 1982 applicable in situations in which a plaintiff is not a member of a racially distinct group, but is merely perceived as such by the defendants. As the Fourth Circuit majority recognized, the result would be to permit the coverage of the statute to be governed by "nothing more than the subjective, irrational perceptions of defendants." 785 F.2d at 527.

As these decisions suggest, any *ad hoc* approach that expands the scope of Sections 1981 and 1982 on a case-by-case basis beyond discrimination against groups generally recognized to be distinct races will inevitably enmesh the courts in an extremely sensitive and controversial area. Not only is this result inconsistent with Congressional intent, as shown above, but it is also unnecessary. Title VII is available to assure full freedom from discrimination in the workplace to persons of all ethnic and national backgrounds. And since Title VII unquestionably applies whether the alleged discrimination is based on national origin or on race or color, it is not necessary for a court in the context of a Title VII action to attempt to draw distinctions between these different types of claims.

Title VII, moreover, establishes specific, detailed procedures for investigating charges of discrimina-

tion and conciliating in an effort to resolve charges by voluntary agreement, a result which this Court repeatedly has recognized as being preferable to litigation. *See, e.g., Ford Motor Co. v. EEOC*, 458 U.S. 219, 229 (1982); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). This is not to suggest that Title VII procedures preempt direct resort to the courts where a cause of action under Section 1981 is available. Clearly, they do not. But it is highly relevant that when Congress in 1964 decided to enact a comprehensive employment discrimination law covering claims based on national origin, religion, and sex as well as race and color, it did not simply amend Section 1981. Rather, it concluded that specific procedures for investigation and conciliation of charges were necessary, and chose not to allow direct resort to the courts unless those prerequisites were satisfied. Thus, a judicial expansion of the scope of Section 1981 that would effectively bring claims based on national origin within its ambit would undermine the scheme Congress carefully developed for dealing with such claims.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the decision of the court below be reversed.

Respectfully submitted,

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a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955) .. 10, 12
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Congressional Globe, 39th Cong., 1st Sess. (1866) . ..... *passim*
S. Feldstein and L. Costello, *The Ordeal of Assimilation* (1974) 18
R. Hofstadter, *Social Darwinism in American Thought* (1955) 19
Lowell, *The Colonial Expansion of the United States*, 83 Atlantic Monthly 145 (1899) 19
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No. 85-2169

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BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The Mexican American Legal Defense and Educational Fund is a national civil rights organization established in 1967. Its principal object is to secure, through litigation and education, the civil rights of Hispanics living in the United States. The Puerto Rican Legal Defense & Education Fund is also a national civil rights organization. Founded in 1972, its principal object is to secure, through litigation and education, the civil rights of Puerto Ricans and other Hispanics living in the United States.

Section 1981 of Title 42, United States Code, has long been an important means of redress for Hispanics victimized by discrimination. In the case at bar, petitioners ask that this Court adopt an extremely narrow view of the discrimination prohibited by Section 1981. If petitioners were to prevail in this case, some doubt might well be cast on the continued availability of Section 1981 as a means of combatting invidious discrimination against Hispanic Americans. For that reason, both of the *amici curiae* have a substantial interest in this case.

The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

SUMMARY OF ARGUMENT

This brief *amicus curiae* is respectfully submitted in support of the judgment of the United States Court of Appeals for the Third Circuit, and we specifically adopt the arguments urged in respondent's brief. The focus of this brief, however, is limited to showing that the judgment below is mandated by the intent of Congress, as manifested in the legislative history of Section 1981.

1. This case presents an important question of statutory construction: the precise scope of the class which Congress intended to protect against private discrimination under 42 U.S.C. § 1981. The answer to this question can be found in the debates of the Thirty-Ninth Congress, which enacted the Civil Rights Act of 1866, including the original version of Section 1981, and several additional statutory provisions concerned with issues of

"race." These debates establish that the Thirty-Ninth Congress intended to prohibit discrimination based on racial groupings, not in the narrow or technical sense in which that concept is sometimes used today, but in a broader sense that includes what we now call ethnic and ancestral groupings. The debates of the Thirty-Ninth Congress include frequent references to "race," but the context of those references manifests a Nineteenth Century usage of the term, a usage which is inconsistent with any neatly defined concept of scientifically distinct "races." Thus, the ethnic groups to which Members of Congress specifically referred as "races" include the "Anglo-Saxon," "Celtic," "German," "Gypsy," "Hindu," "Irish," "Jewish," "Latin," "Scandinavian," and "Spanish" ancestral groups. Moreover, proponents of the 1866 Act specifically emphasized that this legislation was intended to protect the rights of all such groups.

In other words, the legislative history unequivocally establishes that the Thirty-Ninth Congress intended to prohibit discrimination of a "racial" character. The legislative history also shows that the Thirty-Ninth Congress understood and used that term in an inclusive sense, which encompasses discrimination based on membership in ethnic and ancestral groups, which the Thirty-Ninth Congress did not significantly distinguish from groupings based on color or distinctive physiognomy.

2. The intent of the Thirty-Ninth Congress was subsequently reaffirmed when, following ratification of the Fourteenth Amendment, the Forty-First Congress partially restated and wholly reenacted the 1866 Act as part of the Enforcement Act of 1870. The 1870 Act originated as a simple voting rights bill aimed at enforcing the provisions of the Fifteenth Amendment. As the bill passed through Congress, however, it evolved into a more comprehensive

enactment, which also incorporated the equal protection principles embodied in the Fourteenth Amendment. As this Court has long recognized, the concept of equal protection draws no legally significant distinction between "race" and "national origin." *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971); *Strauder v. West Virginia*, 100 U.S. 303 (1880). Thus, the Forty-First Congress's explicit incorporation of equal protection principles in Section 1981 underscores the Thirty-Ninth Congress's original intention of prohibiting private discrimination based on ethnicity or ancestry.

ARGUMENT

I.

THE LEGISLATIVE HISTORY OF SECTION 1981 DEMONSTRATES THAT CONGRESS INTENDED TO PROHIBIT DISCRIMINATION BASED ON ETHNIC AND ANCESTRAL GROUP STATUS.

A. The Thirty-Ninth Congress Understood The Term "Race" To Include Ethnic And Ancestral Groups.

When the Thirty-Ninth Congress enacted Section 1981 in its original form, Congress intended to protect the rights of a certain class of people to be free from private discrimination in certain contexts. Although the lower federal courts have divided with respect to the proper definition of that class, that conflict in authority is wholly unnecessary because it is based on the courts' failure to consider exactly what Congress said and meant when it enacted the statute.

The debates of the Thirty-Ninth Congress show that Congress intended to legislate protection for a class de-

scribed in "racial" terms. Moreover, when the statutory language is viewed in concert with the legislative history of Section 1981 and the related bills that were debated in 1866, it is manifest that the Thirty-Ninth Congress commonly used the word "race" to encompass the concepts of ethnicity and ancestry, and that Congress intended, in prohibiting discrimination of a "racial" character, to prohibit discrimination based on ethnicity and ancestry, as well as discrimination based on color. In other words, the legislative history shows that Congress did not intend to limit the application of Section 1981 to discrimination based on differences of color or physiognomy. Congress recognized that differences in language, cultural traditions, and ancestry may stimulate invidious discrimination based on "race." It was the intention of the Thirty-Ninth Congress to prohibit all such invidious discrimination.

As this Court recently observed, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park'N Fly, Inc. v. Dollar Park And Fly, Inc.*, 469 U.S. 189, 194 (1985). But common usage changes over time, as Justice Holmes noted in *Towne v. Eisner*, 245 U.S. 418, 425 (1918):

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Thus, in construing a statute that was first enacted almost a century and one quarter ago, this Court must strive to understand the words that Congress used in the precise sense in which those words were then commonly understood; modern significations must not be allowed to obscure Congress's true meaning and intent. In other words,

if Congress's intent is to be ascertained, a statute must be interpreted in light of popular usage contemporary with the statute's enactment, and not in the false light of popular usage prevailing at the time the statute is construed. *Perrin v. United States*, 444 U.S. 37, 42 (1979); *United States v. Thind*, 261 U.S. 204, 209 (1923).[1]

In terms, Section 1981 guarantees that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981. On its face, Section 1981 therefore appears to create a right in favor of an undefined class of "non-white" persons.

This Court has already held that the statutory phrase "the same right . . . as is enjoyed by white citizens" signifies only the "racial character" of the rights which the statute protects, and does not foreclose white citizens from stating a Section 1981 claim for racial discrimination. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 293 (1976). As the legislative history shows, the import of this phrase is to manifest Congress's intention not to reach discrimination based on grounds other than "race"

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[1] For purposes of this brief, we assume that the common understanding of the term "race" has narrowed somewhat since 1866. This change is doubtless due to the rise of modern anthropological science and its influence upon our society. At the same time, however, it is important to recognize that modern lexicography still defines the term in the broader way that it was used by the Thirty-Ninth Congress. For example, *Webster's* defines "race" to mean "the descendants of a common ancestor: a family, tribe, people, or nation belonging to the same stock" or "a class or kind of individuals with common characteristics, interests, appearance, or habits as if derived from a common ancestor." *Webster's Third New International Dictionary* at 1870 (1961). As examples of proper usage, *Webster's* notes the expressions "the Anglo-Saxon race" and "the Jewish race." *Id.*; *see also* page 18, note 10, *infra*.

(as Congress understood that term), such as sex and age. *Id.* Representative Shellabarger, one of the sponsors of the bill, made that point with abundant clarity during the 1866 debates (Cong. Globe, 39th Cong., 1st Sess. 1293 (1866)[2]):

> Your State may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not do so as to one race, you shall treat the other likewise.

Plainly, the legislative history contains many references to discrimination on account of "race." But the definitional distinction sometimes drawn today, between "race" and "national origin" discrimination, simply did not exist in 1866. To the Thirty-Ninth Congress—and to the American public for many years before and after 1866—the concept of "race" included what we now commonly call "ethnic groupings," and the term was therefore used, not only to distinguish blacks of African descent and the various peoples of Asia from persons of European ancestry, but also to distinguish among the several ancestral groups of European peoples and the various peoples of Latin or Hispanic ancestry. The legislative history of Section 1981 reflects that Nineteenth Century usage of the term "race."

The language of Section 1981 and its companion, 42 U.S.C. § 1982 ("Section 1982")[3] originated in § 1 of the

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[2] The abbreviation "Cong. Globe" will be used in this brief to refer to Cong. Globe, 39th Cong., 1st Sess. (1866).

[3] Section 1982 grants to "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to . . . hold . . . real and personal property." 42 U.S.C. § 1982.

The proper definition of the class protected under Section 1982 is the question presented in *Shaare Tefila Congregation v. Cobb*, No. 85-2156, which has been consolidated with this case for argument. Because of the common genesis of Sections 1981 and 1982,

(Footnote continued on following page)

Civil Rights Act of 1866, 14 Stat. 27 (the "1866 Act"). *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 383-84 (1982); *see also McDonald*, 427 U.S. at 286 (Section 1981); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-23 (1968) (Section 1982). This Court traditionally has looked to the 1866 debates as the primary source of legislative history for both Sections, because it was during the 1866 debates that the statutory language was most comprehensively discussed. *See, e.g., General Building Contractors*, 458 U.S. at 386-88; *McDonald*, 427 U.S. at 287-96; *Runyon v. McCrary*, 427 U.S. 160, 173 (1976); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *Jones*, 392 U.S. at 422-37; *Georgia v. Rachel*, 384 U.S. 780, 791 (1966).[4]

In ascertaining the true sense in which the Thirty-Ninth Congress used the term "race," the debates concerning the 1866 Act itself provide only part of the story.

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[3] *continued*
the same principles must govern in both cases. *See General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982) (both Section 1981 and Section 1982 originated in the Civil Rights Act of 1866).

[4] The 1866 Act was enacted to enforce the provisions of the Thirteenth Amendment. *The Civil Rights Cases*, 109 U.S. 3, 22 (1883). After ratification of the Fourteenth Amendment, Congress reenacted the 1866 Act in toto as § 18 of the Enforcement Act of 1870, 16 Stat. 140 (the "1870 Act"). *General Building Contractors*, 458 U.S. at 385 n.11; *Jones*, 392 U.S. at 436 n.71. However, § 16 of the 1870 Act also contained, "with minor changes," that portion of the 1866 Act which is now codified as Section 1981. *Runyon*, 427 U.S. at 168-69 n.8; *Jones*, 392 U.S. at 436. *See* Cong. Globe, 41st Cong., 2d Sess. at 3689 (1870). Thus, this Court has held that Section 1981 traces its lineage to both the 1866 Act and the 1870 Act (*Runyon*, 427 U.S. at 169 n.8), and therefore reflects the principles embodied in both the Thirteenth and Fourteenth Amendments. *General Building Contractors*, 458 U.S. at 386. The significance of the 1870 Act is discussed below. *See* pages 21-23, *infra*.

During the first half of 1866, Congress debated four other measures in which issues of "race" were both central and the subject of repeated discussion. Among those measures was the joint resolution that was eventually ratified as the Fourteenth Amendment. *See General Building Contractors*, 458 U.S. at 384, 391. In addition, Congress debated the expanded Freedman's Bureau bill (S. 60), which covered much the same ground as the 1866 Act. *Jones*, 392 U.S. at 423 n.30, 428 n.39. Also under consideration were H.R. 1, a bill to expand the right of suffrage in the District of Columbia (*see, e.g.*, Cong. Globe at 216, 255, 311), and S.R. 11, a resolution concerning "provisional governments in rebel states" (*see, e.g., id.* at 291). In all of the debates concerning these various measures, the word "race" was repeatedly used, not simply to signify groups identifiable by color or physiognomy, but also to describe the various national or ethnic groupings that were commonly recognized then and still are recognized today.

Congress's use of language during the 1866 debates exhibited three marked characteristics. First, the term "race" was used as a means of distinguishing among various groups, which we now commonly call "ethnic" or "ancestral" groups, including the various ancestral groups of European peoples. Congress's use of the term "race" does not evidence a definition based solely on distinctions of color or physiognomy. Rather, it reflects a broader definition encompassing discernible, commonly recognized ethnic traits. Second, Hispanics or Latins were expressly mentioned as a "race" separate and apart from whites. Third, the term "white" was often used in a very narrow sense to describe persons whose ancestors had emigrated to this country from England. In addition, the legislative history shows that Congress clearly intended the 1866 Act to af-

ford protection against private discrimination to all such "racial" groups.

1. "Race" As Including Ancestral Groupings

Speeches referring to a variety of "races," each corresponding to what we would now call an "ethnic" group, were common. For example, Senator McDougall, speaking against the expanded Freedman's Bureau bill, stated (Cong. Globe at 401, emphasis added):

> I believe something in that Scandinavian race that came from the frozen North .... I believe something in the Saxon and the Celt. But the Numidian . . . and the Carthaginian, not of northern, but of high eastern blood, went down, and so did India, and so did the East, and so did Italy, even before the northern barbarians.
>
> * * *
>
> [N]ever, while I am able to express myself either by word or action, will I commit the great legacy of our fathers, our Constitution . . . to any who are inferior to the *properly understood white races*.

Speaking against a subsequently rejected version of the Fourteenth Amendment resolution,[5] Representative Shellabarger, a proponent of the Civil Rights bill that was eventually enacted as the 1866 Act, stated that the resolution would (*id.* at 405):

> authorize[ ] the States to wholly disfranchise entire races of its people, and that, too, whether that race be white or black, Saxon, Celtic, or Caucasian . . . .

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[5] This version of the Fourteenth Amendment resolution would have permitted each state to disfranchise any group of persons, but would have reduced that state's congressional representation accordingly. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 30-31 (1955).

Speaking against the Civil Rights bill itself, Senator Cowan observed that the early American colonists granted equal political privileges (*id.* at 499):

> to men of their own race from Europe. They opened [the door] to the Irishman, they opened it to the German, they opened it to the Scandinavian races of the North.

Similarly, Senator Cowan also asked (*id.*):

> I should like the honorable Senator from Illinois [Senator Trumbull] or any other Senator to tell me what is meant by the word "race," and where it is settled that there are two races of men, and if it is settled that there are two or more, how many. Where is the line to be drawn?

No one responded to Senator Cowan's question. But that question, coupled with Senator Cowan's own earlier use of the term "Scandinavian races," indicates that "race" had no narrow or technical meaning for him. For Senator Cowan, as for virtually all of the Members who spoke, "race" was simply a colloquial equivalent for "ethnic group," "nationality," or "people."

Representative Shellabarger explained the coverage of the Civil Rights bill most explicitly in ethnic "race" terms (*id.* at 1294):

> Who will say that Ohio can pass a law enacting that no man of the German race, and whom the United States has made a citizen of the United States, shall ever own any property in Ohio, or shall ever make a contract in Ohio . . .? If Ohio may pass such a law, and exclude a German citizen, not because he is a bad man . . . but because he is of the German nationality or race, then . . . you have the spectacle of an American citizen admitted to all its high privileges . . . and yet that citizen is not entitled to either contract, inherit, own property, work, or live upon a single spot of the Republic, nor to breathe its air.

Similarly, Representative Lawrence stated that the Civil Rights bill would protect groups of "naturalized citizens" against state hostility. *Id.* at 1833.[6]

Still other ethnic groups that were described as "races" were Gypsies (*id.* at 498, remarks of Sen. Cowan; *id.* at 1857-58, President Johnson's veto message[7]), Jews (*id.* at 542, remarks of Rep. Dawson), and "Hindoos" (*id.* at 523, remarks of Sen. Davis).

2. "Latins" As A Distinct "Race"

Another common usage is reflected in various Members' discussions of their perception that the Latin or Spanish "race," unlike the Anglo-Saxon or white "race," had failed to establish stable governments in the Western Hemisphere. Representative Kasson argued (*id.* at 238):

> Why, sir, look at those countries where mixed bloods have controlled the Government by universal suffrage. Look at Mexico and the South American republics . . . . Look at the Latin races of the world, and where have they ever succeeded in establishing a permanent and reliable republican Government . . .?

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[6] Representative Lawrence's comments concerning the protection afforded to "naturalized citizens" necessarily referred to members of various white ethnic groups, rather than to blacks or Orientals, because only "free white person[s]" were entitled to naturalization until 1870. *See* Act of March 26, 1790, 1 Stat. 103; *see also* Act of July 14, 1870, 16 Stat. 254 (extending the right of naturalization to "aliens of African nativity and to persons of African descent"). In 1866, therefore, any protection envisioned for "naturalized citizens" necessarily meant protection for members of white ethnic groups—the very groups that would be excluded from protection under Section 1981 if petitioners' construction were adopted.

[7] President Johnson vetoed the Civil Rights bill, but both Houses quickly acted to override the President's veto. *See* Bickel, 69 Harv. L. Rev. at 28-29.

Speaking of Mexico and Peru, Senator Morrill stated (*id.* at 251):

> The dominance of these colonists of the Spanish race . . . was lost only when the gangrene of miscegenation had wasted the energies . . . of that portion of the people . . . .
>
> This decay of national virtue and prowess was most striking in the Spanish-American countries where there was the greatest admixture of the races; hence Mexico was conspicuous in that respect.

Similarly, Representative Kelley suggested that the men who discovered America were not "what we call white men," but were "what are generally known as Basque." *Id.* at 306. Finally, Representative Dawson claimed (*id.* at 542):

> It is impossible that two distinct races should exist harmoniously in the same country, on the same footing of equality by the law. The result must be a disgusting and deteriorating admixture of races, such as is presented in the Spanish States of America by the crossing of the Castilian with the Aztec and the negro.

Thus, Mexicans, either by virtue of their "Latin" blood or because of their intermarriages, were perceived as a "race" separate and apart from whites and blacks, as Representative Johnson's remarks also indicate (*id.* at 306):

> What is it that has torn Mexico all to pieces? The negro blood that runs through the race.

3. "White Race" As "Anglo-Saxon Race"

Finally, far from identifying themselves simply as "white," many Members of Congress specifically advanced the image of an "Anglo-Saxon race," excluding from their membership many persons considered "white" today. Thus, the

term "white race" itself appears to have been afforded an ethnic signification which excluded those whose ancestors had not emigrated to this country from England. Speaking against the District of Columbia Suffrage bill, Representative Kasson stated (*id.* at 238):

> No one denies, as I understand it, that the Latin race, that the mixed races of Indian and Latin, or the mixed race of blacks and whites, or any other races, have developed, as the Anglo-Saxon race has done, the power to govern itself . . . .

Senator Nesmith, speaking on the question of provisional governments in Southern states, observed (*id.* at 291):

> I still believe that this is a white man's Government, framed by white men . . . . [T]he hardy, persevering, industrious, brave, and intelligent Anglo-Saxon race and their descendants, who brought civilization and the arts into the New World . . . are not to be overridden . . . .

And, on the same topic, Senator Stewart stated (*id.* at 298):

> I believe the Anglo-Saxon race can govern this country. . . . I believe it because it is the only race that has ever founded such institutions as ours.

Indeed, Representative Dawson's comments on the expanded Freedman's Bureau bill explicitly show that he saw himself and the other Members of Congress as members of an Anglo-Saxon "race" (*id.* at 542, emphasis added):

> Negro suffrage will, in its tendency, force down the Anglo-Saxon to the negro level, and result inevitably in amalgamation and deterioration of *our* race.

4. Act Applicable To All Such Groups

The foregoing survey demonstrates that the Thirty-Ninth Congress attributed no anthropologically fixed mean-

ing to the word "race," but used that term in a broad sense to describe national or ethnic groups which had attained an historically distinct identity. Although not every Member of the Thirty-Ninth Congress spoke in that manner, no one protested that the many who did so were guilty of distorting the common language of the day.[8]

To be sure, the most immediate problem faced by the Thirty-Ninth Congress was protection of recently freed slaves. *General Building Contractors*, 458 U.S. at 388. But it is equally true that the Thirty-Ninth Congress intended to legislate more generally, as this Court has noted (*McDonald*, 427 U.S. at 296):

> [T]he statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.

The scope of that principle can be understood both from the inclusive construction which the Thirty-Ninth Congress gave to the word "race," and from Congress's narrow understanding of the term "white," which focused on Anglo-Saxon ancestry, to the exclusion of Gypsy, Hindu, Jewish, and Latin groups, all of which would generally be considered "Caucasian" in today's racial terminology.

That is not to say that Congress included ethnic or national origin groups within the class to be protected by Section 1981 simply because the available vocabulary made

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[8] Only one member of the Thirty-Ninth Congress dwelt at any length on what might be considered an anthropological approach to race. *See* Cong. Globe at 246-47 (remarks of Sen. Morrill). However, nothing in the legislative record suggests that Congress had any interest in Senator Morrill's analysis.

their exclusion impossible. On the contrary, the Thirty-Ninth Congress, with a remarkably prescient understanding that this Nation would soon be transformed into a Nation of Immigrants, affirmatively intended that discrimination against ethnic groups should be addressed on the same terms as discrimination against blacks. As Representative Lawrence explained (Cong. Globe at 1833):

> This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.

Moreover, the proponents of the 1866 Act emphasized its application to all such groups. *See id.* at 1294 (remarks of Rep. Shellabarger); *id.* at 1833 (remarks of Rep. Lawrence).

If Congress's only purpose had been to address the special problems of newly freed slaves, it could have cast the 1866 Act in terms of "previous condition of servitude." Or, if Congress's purpose had been to grant rights only to blacks, it could have done so using the common terms "blacks," "Negroes," or "Africans," which would have afforded protection to all blacks, without regard to whether they were newly emancipated. *Cf. United States v. Louisiana*, 225 F. Supp. 353, 363-64 n. 9 (E.D. La. 1963) (three-judge court) (Wisdom, J.), *aff'd*, 380 U.S. 145 (1965). But, by providing that "all persons" should have "the same right . . . as is enjoyed by white citizens," Congress necessarily, and intentionally, opened up the field beyond

discrimination against blacks.[9] The logical conclusion—compelled by the language used in the debates—is that by opening up the class beyond newly freed blacks, the 1866 Act was meant to prohibit discrimination against all ethnic groups.

B. In Just The Same Manner As The Thirty-Ninth Congress, This Court Regularly Used The Term "Race" To Include Ethnicity During The Nineteenth And Early Twentieth Centuries.

The Thirty-Ninth Congress's own pronouncements well demonstrate the sense in which it understood and employed the term "race." In addition, contemporaneous decisions of this Court establish that Congress's understanding of the term was not idiosyncratic, but fully conformed to then-current usage.

Only two years before Congress enacted Section 1981, this Court had occasion to use the term "race" in the same sense in which the Thirty-Ninth Congress used it, that is, in the sense of "ethnic group." In *White v. United States*, 68 U.S. (1 Wall.) 660, 680-81 (1864), the Court observed: "The Mexicans of the Spanish race, like their progenitors, were a formal people . . . ." Nearly a decade later, in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873), this Court observed that the Thirteenth Amendment would prohibit slavery "of the Mexican or Chinese race."

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[9] As a matter of pure logic, it might be argued that the Thirty-Ninth Congress cast the 1866 Act in broader terms only because Congress intended to prohibit invidious discrimination against Orientals and American Indians (but no other groups), in addition to blacks. That theoretical possibility is unconvincing because the 1866 debates evidence no special solicitude for Orientals and American Indians.

That expansive sense of the word "race" persisted well into the Twentieth Century. In *Hodges v. United States*, 203 U.S. 1, 17 (1906), the Court said that the Thirteenth Amendment

> reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African.

Similarly, in *Panama Railroad Company v. Rock*, 266 U.S. 209, 212 (1924), this Court described Chile and Panama as being "predominantly Spanish [as distinct from French] in race." Even as late as 1934, Justice Cardozo questioned whether Mexicans were "white persons" entitled to be naturalized. *Morrison v. California*, 291 U.S. 82, 95 n.5 (1934). Indeed, Justice Cardozo went on to note that Mexican migration to California had resulted in "racial problems." *Id.*

It should not be assumed that the eminent authors of these opinions were simply careless or imprecise in their use of language. *See* page 6, note 1, *infra*. The point is not whether they were "correct," as a matter of modern anthropological science, in referring to Anglo-Saxon, Chinese, French, Italian, Mexican, and Spanish ethnic groups as "races." The point is that they did so,[10] and

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[10] Indeed, the Court's diction was far from idiosyncratic, but fully agreed with then-current usage. For example, an 1868 account of Irish immigration, which is quoted in S. Feldstein and L. Costello, *The Ordeal of Assimilation* 27 (1974), stated that "10,000 of the Irish race" died in quarantine after arrival here. Similarly, in a 1917 article, which is also quoted by Feldstein and Costello (*id.* at 54), an Ellis Island physician observed that:

(Footnote continued on following page)

their usage of the term "race" is persuasive evidence of the common understanding of the times.[11]

The words of the Thirty-Ninth Congress must be construed as its Members used them. Those Members did not omit "national origin" as a basis for discrimination when they spoke of "race" (*Ortiz v. Bank of America*, 547 F. Supp. 550, 555 (E.D. Cal. 1982)), and no such omission was then inherent in common language usage.

It is therefore proper to say that the legislative history shows that Congress intended to address discrimination

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[10] *continued*

> Those who have inspected immigrants know that almost every race has its own type of reaction during the line inspection. On the line if an Englishman reacts to questions in the manner of an Irishman, his lack of mental balance would be suspected. The converse is also true. If the Italian responded to questions as the Russian Finn responds, the former would in all probability be suffering with a depressive psychosis.

In an 1899 article, President Lowell of Harvard argued that New Mexico was not ready for statehood because "a large part of the inhabitants [were] of Spanish race, and not sufficiently trained in habits of self-government." Lowell, *The Colonial Expansion of the United States*, 83 Atlantic Monthly 145, 149 (1899). By contrast, Lowell observed, the "English-speaking race" had "political good sense." *Id.* at 150. *See also* R. Hofstadter, *Social Darwinism in American Thought*, 171-72 (1955) (quoting contemporary sources justifying military campaigns against Mexico through the alleged superiority of the "Anglo-Saxon race").

[11] Although the dictionary definition of the term "race" may not have changed significantly in the last 120 years (see page 6, note 1, *supra*), there is little doubt that the term describes an evolving concept of social science. *See generally The Concept of Race* (A. Montagu ed. 1964). If this Court were to ignore the intent of the Thirty-Ninth Congress and hold that a present-day definition of "race" defined the scope of the statute, the courts' approach to defining races would necessarily change as social and scientific attitudes changed. Under such an approach, the meaning of the statute would always be in flux.

of a "racial character." But properly seen in its contemporary linguistic context, that intent comprehends discrimination against all persons based on their connection to commonly recognized national or ethnic groups, as well as discrimination based on color.

This Court's function in cases of statutory construction is to give effect to Congress's intent. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-78 (1982). In this case, the Court must adhere to the original and manifest intent of the Thirty-Ninth Congress, and the Court must therefore hold that discrimination based on Arab ancestry—as well as discrimination based on Jewish, Hispanic, Spanish, or other ethnic ancestry—is prohibited by Section 1981, notwithstanding any intervening change in the common usage of the words "race" or "white."

II.

A CONSTRUCTION OF SECTION 1981 WHICH INCLUDES NATIONAL ORIGIN OR ETHNIC GROUP DISCRIMINATION IS MANDATED BY CONGRESS'S PURPOSE IN REENACTING THE STATUTE IN 1870.

Congress's 1866 language usage clearly establishes the intended inclusion of ethnic groups within the class to be protected by the 1866 Act. In addition, Congress's 1870 restatement and reenactment of the 1866 Act confirms that intention. Framed against the equal protection background of the Fourteenth Amendment, the 1870 Act was intended to remedy the same kind of class-based discrimination already prohibited to the states under the Equal Protection Clause.

A. The 1866 Act, As Recast In The 1870 Act, Was Intended To Embody A Fourteenth Amendment Equal Protection Standard.

As this Court has observed, the 1866 Act was "an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of 'incorporat[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land.' " *General Building Contractors*, 458 U.S. at 389 (citation omitted). The 1870 Act "was enacted as a means of enforcing the recently ratified Fourteenth Amendment." *Id.* Thus, this Court noted a century ago that the Due Process and Equal Protection Clauses of the Fourteenth Amendment applied to "all persons . . . without regard to any differences of race, of color, or of nationality" and that § 1977 of the Revised Statutes (which was § 16 of the 1870 Act and is now Section 1981) was enacted to enforce those clauses "accordingly." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The proponents of the 1870 Act expressly embraced a Fourteenth Amendment equal protection approach to the statute. Both the House and Senate bills originally were narrowly drafted as voting rights bills to enforce the Fifteenth Amendment. *See* Cong. Globe, 41st Cong., 2d Sess. 2755 (House); *id.* at 3479-80 (Senate). But Senator Stewart, one of the sponsors, moved to amend the Senate bill by including several sections "to secure to all persons the equal protection of the laws." *Id.* at 3480. Senator Stewart's amendment contained three sections, the first of which became § 16 of the 1870 Act (containing the basic provisions now found in Section 1981), and the third of which provided (*id.*):

> That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April 9, 1866, is hereby re-

> ënacted; and said act, except the first and second sections thereof, is hereby referred to and made a part of this act . . . .[12]

By framing a new civil rights provision (§ 16), and by reenacting the 1866 Act in light of changed circumstances (the incorporation of equal protection principles into the organic law through the Fourteenth Amendment), Congress explicitly embraced the view that Section 1981 and Section 1982 go beyond "race discrimination" (as that term is commonly used today), thus making the statutory provision an equal protection analogue.

This Court already has held that Congress, in enacting Section 1981, intended to incorporate the underlying equal protection principles. In *General Building Contractors*,

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[12] As originally drafted, the third section of the Stewart amendment apparently excluded § 1 of the 1866 Act—from which, as we have already noted (*see* pages 7-8, *supra*), the operative language of both Section 1981 and Section 1982 was derived. *See General Building Contractors*, 458 U.S. at 385 n.11. Thus, the net result of Senator Stewart's amendment would have been to extend the rights of entering into contracts and bringing suit—restated from the 1866 Act in § 16 of the 1870 Act—on the same terms as provided in the Equal Protection Clause, while eliminating entirely the rights to hold real and personal property embodied in § 1 of the 1866 Act but not restated in the 1870 bill.

That oversight was corrected, and § 18 of the 1870 Act as passed by the Senate provided (Cong. Globe, 41st Cong., 2d Sess. at 3689 (1870):

> That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April 9, 1866, is hereby reënacted . . . .

Thus, the Senate version of the 1870 bill not only contained a specific provision to protect the right to contract (§ 16), but also reenacted the *whole* 1866 Act, including the provisions now found in Section 1982. And it did so expressly, as Senator Stewart said, "to secure to all persons the equal protection of the laws" (*id.* at 3480).

this Court looked to the historical linkage between the Fourteenth Amendment and Section 1981 to hold that the purposeful discrimination standard applicable to equal protection cases applies to private discrimination under Section 1981. The Court stated (458 U.S. at 389-90):

> The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself.

Congress's parallel consideration of the 1866 Act and the Joint Resolution, followed not long after by the passage of the 1870 Act (with its specific equal protection underpinnings), shows that Congress neither knew any distinction between "race" and ethnicity or ancestry nor intended to draw any such distinction. Interpreting Section 1981 to include ethnicity or ancestry discrimination in an equal protection analysis is concordant with congressional intent in both 1866 and 1870.

B. This Court's Equal Protection Cases Show That There Is No Legally Significant Distinction Between Discrimination Based On Race And Discrimination Based On National Origin Or Ethnicity.

"National origin" means "ancestry." *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 89 (1973). Like race, ancestry (or ethnic background) is an "immutable characteristic." *Lockhart v. McCree*, 106 S. Ct. 1758, 1766 (1986). Both are "determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

In addition, both race and national origin may involve distinctive physical characteristics that tend to distinguish a person and therefore invite disparate treatment by those who would practice discrimination. As a result, not only the differences themselves, but "stereotyped characteristics not truly indicative of their abilities" have promoted discrimination against members of both racial and ethnic groups. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

For these reasons, this Court has long treated race and national origin alike under the Equal Protection Clause. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). As Justice Stewart noted in *Fullilove v. Klutznick*, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting):

> The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 [(1943)].

See also Frontiero, 411 U.S. at 686 (plurality opinion); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) ("Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the [Fourteenth] amendment.").

Because the 1870 Act was framed in equal protection terms, the equivalence of race and national origin discrimination under the Equal Protection Clause was intended to be carried over to the prohibition of private discrimination under Section 1981. The irrelevance and unfairness of basing governmental classifications on race and ancestry

is something this Court has long recognized. Private discrimination on those grounds is no less irrelevant and unfair. That is what Congress recognized when it enacted §§ 16 and 18 of the 1870 Act.[13]

The concepts of "race" and ancestry are closely related. The same rationale that condemns discrimination on the one basis necessarily condemns discrimination on the other. It would be contrary to Congress's manifest intent in enacting Section 1981 to separate the two concepts. This Court should reaffirm Congress's original intent to provide protection against discrimination based on ancestry, ethnicity, and national origin.

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[13] Moreover, this Court has long recognized that race and color differences "have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws." *Hernandez v. Texas*, 347 U.S. 475, 478 (1954). Ancestry and ethnicity are also recognized bases for defining groups in our society. Whether by appearance, by language, by cultural traditions, by surname, or by other factors, members of ethnic groups are easily recognized and all too frequently targeted for invidious discrimination. As this Court said in *Castaneda v. Partida*, 430 U.S. 482, 495 (1977), "it is no longer open to doubt that Mexican-Americans are a clearly identifiable class" for equal protection purposes. *See also Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970 (10th Cir. 1979) (group identity of Mexican-Americans is "perfectly clear and well understood" for Section 1981 analysis).

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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